82-972

Office-Supreme Court, U.S.
FILED
DEC 10 1982
ALEXANDER L. STEVAS,
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No.

IN THE

Supreme Court of the United States

October Term, 1982

H.R. Gibson, Jr., Gerald P. Gibson, Gibsons Inc., and Gibson's Discount Centers, Inc., Petitioners,

V.

Federal Trade Commission

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where Respondents in an FTC adjudicative proceeding are expressly found *not* to have violated §2(c) of the Robinson-Patman Act, 15 USC §13(c), and both the Administrative Law Judge and the Commission agree that such charges should be *dismissed*, may the Commission nonetheless issue the same order against Respondents as though they had been found guilty, under the Commission's so-called "fencing in" authority?

2. Does the due process right to an adjudicative hearing under 5 USC §554 and 15 USC §45 become a charade, if the Federal Trade Commission may impose the same sanctions against Respondents specifically found not guilty as against those found guilty, under the guise of "fencing in"?

PARTIES TO PROCEEDING IN COURT BELOW

The proceeding in the Fifth Circuit Court of Appeals involved two cases, *Herbert R. Gibson, Jr., Gerald P. Gibson, Gibsons, Inc., Gibson's Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc. and Gibson's Products Co., Inc. v. Federal Trade Commission,* No. 80-1746, on appeal from an order of the Federal Trade Commission, and *H.R. Gibson, Sr., et al v. Federal Trade Commission,* No. 80-1743 also on appeal from an order of the Federal Trade Commission. The two cases were combined for argument and opinion by the Fifth Circuit. Although named as Respondents in the original FTC complaint, Ideal Travel Agency, Inc. and Gibson Warehouse, Inc. are not parties to this petition for certiorari because the FTC order dismissed the complaint as to those entities. Likewise, Gibson Products Company, Inc. has been dissolved and is not a party to this petition.

The Respondent is the Federal Trade Commission.

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OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 682 F 2d 554 (5th Cir. 1982). The opinion of the Federal Trade Commission is reported at 95 FTC 721 (1980).

JURISDICTION

The opinion and judgment of the Fifth Circuit Court of Appeals was rendered on August 13, 1982. On August 25, 1982 these petitioners filed their Petition for Rehearing and such petition was denied on September 13, 1982. Under 15 USC §45(g) no motion for stay of mandate was necessary, and this petition for certiorari is timely filed under 28 USC §2101(c). The jurisdiction of this Court rests on 28 USC §1254 and 15 USC §45(c).

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, 15 USC §45(b), governs the FTC's authority to issue orders prohibiting unfair methods of competition and violations of the antitrust laws. That section also imposes penalties of up to $10,000 per day for violation of FTC orders. The specific antitrust statute upon which the FTC order rests in this case is 15 USC §13(c), commonly referred to as Robinson-Patman 2(c), which prohibits the payment of brokerage by one party in a transaction to the other party. Since the provisions of these statutes are lengthy, their pertinent text is set forth in the appendix.

STATEMENT OF THE CASE

Petitioners Herb Gibson, Jr. and Gerald Gibson have been prosecuted for the past seven years by the FTC solely because they happened to be born the sons of H.R. Gibson, Sr. To understand their predicament, some factual background is necessary.

In 1958 Petitioners' father, H.R. Gibson, Sr., founded the first Gibson Discount center and began to franchise the use of Gibson trademarks and trade names to others who wanted to open retail Gibson Discount Center stores.

Around 1963, after Petitioners graduated from college, they too opened their own Gibson Discount Center stores and paid a franchise fee to their father for the use of his trademarks and trade names. Petitioners were independent businessmen, and their father had no ownership interest in or control over their stores.

In the late 1960's, Petitioners saw the drastic changes taking place in discount merchandising, and realized it would be necessary to pool their retailing interests, and to centralize buying and administrative functions for their hitherto autonomously operated stores. In the process of consolidating their own interests, Petitioners approached their father and contracted to buy his trademarks and trade names, as well as various stock interests their father had in corporations operating other Gibson Discount Center stores. Because the legal arrangements and tax aspects were very complex, the sale was not finalized until November 1, 1972.

Petitioners consolidated their own retail interests, and the interests and trademarks and trade names purchased from their father, under a new company called Gibsons, Inc. From its formation, Petitioners had ownership and total control of that company.

After November 1, 1972, Petitioners moved to set up their own central warehouse and buying staff, and to upgrade, modernize and control the Gibson stores now under the umbrella of Gibsons, Inc. In this process, Petitioners hired expert management people from other companies such as Sears, Nash Hardware, Alexander Grant & Co., and others.

After November 1, 1972, Petitioners' father, H.R. Gibson, Sr., devoted his energies to building and running a sales organization called The Gibson Trade Show -- in effect, a giant manufacturer's representative. Petitioners' father did not participate in or exercise any influence whatsoever over Petitioners' business operations. Likewise, Petitioners had no interest in or influence over their father's business.

In 1975 the Federal Trade Commission filed a complaint against H.R. Gibson, Sr. and several of the companies he had previously owned an interest in.[1] The FTC also included these Petitioners in the complaint, together with their company, Gibsons, Inc. The complaint contained three counts: Count I charged that the fees paid by suppliers to H.R. Gibson, Sr. in connection with his trade show were in effect discriminatory promotional allowances prohibited by Robinson-Patman §2(d) and §2(e) (15 USC §13(d), (e)). Count II alleged that various Gibson Discount Center stores had boycotted suppliers who did not grant the "special allowances" as set forth in Count I. And Count III charged H.R. Gibson, Sr., as well as these Petitioners, with accepting or receiving illegal brokerage prohibited by Robinson-Patman §2(c) (15 USC §13(c)).

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[1]These companies were Gibson's Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc., and Gibson Products Company, Inc. These were among the interests purchased by petitioners from their father in 1972.

At the beginning of the trial it became apparent that FTC complaint counsel had no knowledge of the business set-up of these Petitioners. Indeed, complaint counsel had the mistaken belief that Petitioners' father, H.R. Gibson, Sr., owned and operated Petitioners retail businesses! After ten months of trial, however, it was clearly established that H.R. Gibson, Sr. had no connection with Petitioners' business operations. Public auditors, bankers and others confirmed that no monies were passed through from H.R. Gibson, Sr. to Petitioners, and that Petitioners were not controlled or influenced in their business decisions by their father -- or vice versa.

At the conclusion of the trial the Administrative Law Judge dismissed Counts I and III against these Petitioners.[2] On appeal, the Federal Trade Commission affirmed the dismissal of both Count I and III, but nonetheless entered an order against these Petitioners on the Count III charges for "fencing in purposes". (FTC *Order*, April 30, 1980)

Thus, after a costly ten-month trial and an express finding of no violation by both the Administrative Law Judge and the Commission, these Petitioners ended up with the same Count III order against them as was entered against those respondents actually found guilty of accepting illegal brokerage.

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[2]The Count II boycott charges were upheld based on activities of certain store corporations before these Petitioners purchased such store corporations from their father. Indeed, the evidence showed, and the Administrative Law Judge recognized, that the stores actually owned by these Petitioners at the time *continued to buy* from the allegedly boycotted suppliers. (See, *Initial Decision*, 209,210)

Petitioners therefore appealed to the Fifth Circuit on the grounds that the Commission's order was overbroad. In its August 13, 1982 opinion, the Fifth Circuit deferred to the Commission's "wide discretion in determining what type of order is necessary to remedy the unfair practices found." 682 F 2d at 572.

These Petitioners petitioned the Fifth Circuit for rehearing, urging, *inter alia,* that the Commission surely cannot under the guise of its "wide discretion" impose the same sanctions against the innocent as against the guilty, and that an order imposing sanctions under Count III cannot by any stretch of the imagination be reasonably related to the violation if there has been an express finding of no violation. Nevertheless, the petition for rehearing was denied on September 13, 1982 and Herb Gibson, Jr. and Gerald Gibson now petition this Court to grant certiorari.

REASONS THE WRIT SHOULD BE GRANTED

This Court has noted that it is not possible to generalize as to the proper scope of FTC orders, since "it depends on the facts of each case", *Federal Trade Commission v. Mandel Brothers, Inc.,* 359 US 385, 392 (1959). However, this Court has established certain basic guidelines for determining whether an FTC order is impermissibly broad in scope.

First, it is axiomatic that orders of the Federal Trade Commission should "go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public." *Federal Trade Commission v. Royal Milling Company,* 288 US 212, 217 (1933). Second, the scope of the FTC's order must have a "reasonable relation to the unlawful practices found to exist." *Federal Trade Commission v. National Lead Company,* 352 US 419, 445 (1957), *Federal Trade Commission v. Ruberoid Co.,* 343 US 470, 473 (1952), *Federal Trade Commission v. Colgate-Palmolive Co.,* 380 US 374, 394-395 (1965).

In previous cases, this Court has upheld broad FTC orders against violators on the theory that "those caught violating the Act must expect some fencing in." *Federal Trade Commission v. National Lead Company, supra,* 352 US at 431. In each case where a broad order has been upheld, however, it was against a respondent who had clearly violated the law. In *National Lead,* for instance, the Court found that respondents "have plainly disregarded the law." 352 US at 445. Likewise, in *Federal Trade Commission v. Ruberoid Co.,* the respondent had "discriminated among customers in the prices charged them for roofing materials" in a number of specific instances. 343 US at 472. In *Federal Trade Commission v. Mandel Brothers* this Court allowed a broad FTC order to stand where the episodes of misbranding had been extensive and substantial. In that case the Court stated that the proper scope of the FTC's order required "a judgement as to the extent to which a particular *violator* should be fenced in". 359 US at 392. Again, in *Federal Trade Commission v. Colgate-Palmolive Co.,* the Court allowed a broad order because the respondents had already produced three deceptive commercials and there were indications they intended to use the same deceptive practices in advertising other products.

However, this Court has never definitively ruled on whether the FTC's so-called "fencing in" powers allow the Commission to impose the same sanctions on the innocent as on the guilty. This Court has never addressed the critical issues presented by the facts in this case:

(1) Where an FTC charge is expressly *dismissed,* because of no violation, and that dismissal is affirmed by the Commission on appeal, may an order still be entered against the respondents on the charge that was dismissed under the guise of "fencing in"?

(2) If the FTC's "fencing in" powers allow it to enter an order against respondents on a charge that has been dismissed, does this vitiate the right to a due process hearing by rendering the hearing an expensive charade?

Although this Court has never definitively ruled on these issues, several of the United States Courts of Appeals have done so. And in similar factual situations the Courts of Appeals have generally held that the FTC may *not* use its "fencing in" power to impose an order against a respondent who has been expressly found not guilty of violating the Act. In *ITT Continental Baking Company, Inc., v. Federal Trade Commission,* 532 F 2d 207 (2d Cir. 1976) the FTC charged that ITT made twelve nutritional misrepresentations in its advertisements of Wonder Bread and Hostess Snack Cakes. The Commission found that the evidence did not support eleven of the charges and dismissed them. The Commission did find one nutritional misrepresentation, and based on that violation entered a broad cease and desist order. On appeal, the Second Circuit limited the scope of the FTC's order to the violations for which ITT had been found guilty, stating that

> "... paragraph 1(a), (b) and (c) of the cease and desist order were framed to remedy wrongs *which the Commission found not to have been committed.*"
>
> 532 F 2d at 221
> (emphasis added)

Here, too, the FTC's order against Petitioners in the present case is framed to remedy wrongs which both the Administrative Law Judge and the Commission found Petitioners did not commit. Such order is therefore not "reasonably related" to the violation, because there was an express finding of *no* violation.

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In *Country Tweeds, Inc. v. Federal Trade Commission,* 326 F 2d 144 (2d Cir. 1964) the FTC found respondents had misrepresented only the quality of their cashmere, but entered an order prohibiting respondents from "misrepresenting in any manner the quality of the cashmere *or other fabric* in their merchandise." 326 F 2d at 148 (emphasis added). The court held that the FTC's order was overbroad and was not reasonably related to the violation proved, and restricted the order to misrepresentations concerning cashmere.[1]

In *R.H. Macy & Co. v. Federal Trade Commission,* 326 F 2d 445 (2d Cir. 1964) the court confirmed that an FTC order "should be limited to the particular kind of practice found unlawful." 326 F 2d at 450. Accord: *Grand Union Co. v. FTC,* 300 F 2d 92, 100 (2d Cir. 1962), *American News Co. v. FTC,* 300 F 2d 104, 111 (2d Cir. 1962). It follows that since these Petitioners were found in the present case *not* to have violated §2(c), no order should be issued against them on that count.

Likewise, in *National Dairy Products Corporation v. Federal Trade Commission,* 412 F 2d 605 (7th Cir. 1969) the respondent was found guilty of charges of price discrimination in violation of Robinson-Patman 2(a) as to its sale of fruit spreads. The Commission's final order, however, was not limited to fruit spreads but also included other food products concerning which the Commission had specifically dismissed a §2(a) charge. There, as here, the Administrative Law Judge had recommended that the order be limited to the violations actually found to have

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[1]The Second Circuit took cognizance of the suggestion in *FTC v. Henry Broch & Co.,* 368 US 360, 367-368, and reiterated in *FTC v. Colgate-Palmolive, supra,* 380 US at 392, that the stiff penalty procedures under the 1959 amendments to the Federal Trade Commission Act may well require a more specific and precise order than would have been necessary prior to the enactment of those penalties.

been committed by the respondent. The Seventh Circuit agreed that the Commission's order was overbroad and limited it to price discriminations in connection with fruit spreads. *Accord: Grove Laboratories v. Federal Trade Commission,* 418 F 2d 489, 497 (5th Cir. 1969), *cf., Porter & Dietsch, Inc. v. Federal Trade Commission,* 605 F 2d 294, 309 (7th Cir. 1979).

The Fifth Circuit below did not consider *ITT Continental Baking Company, Inc.* and the other cases *supra,* that prohibit the FTC from using its "fencing in" authority to impose orders on respondents that have been found not to have violated the law. Review by this Court is therefore needed for the following reasons:

(1) To delineate the scope of the Federal Trade Commission's discretion in issuing orders against non-violators;

(2) To determine whether the due process right to a hearing may be nullified by the FTC's so-called "fencing in authority";

(3) To resolve whether the FTC may enter the same order against the innocent as against the guilty.

CONCLUSION

Although this Court has indicated in the past that the FTC will be allowed some discretion in framing its orders, such discretion must surely be limited where a respondent has been found not to have violated the law, and the charges have been expressly dismissed by the FTC. Guidance is needed from this Court as to the proper scope of FTC orders against non-violators. Only this Court can

resolve the current uncertainty as to the "fencing in" powers of the FTC. Petitioners therefore pray that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition were mailed to the Solicitor General, US Department of Justice, Washington, D.C., and to the Federal Trade Commission, Washington, D.C. on this 10th day of December, 1982.

Robert E. Rader, Jr.
Robert E. Rader, Jr.

APPENDIX

HERBERT R. GIBSON, JR., GERALD P. GIBSON, GIBSON'S, INC., GIBSON'S DISCOUNT CENTERS, INC., IDEAL TRAVEL AGENCY, INC., GIBSON WAREHOUSE, INC. AND GIBSON'S PRODUCTS CO., INC., Petitioners,

v.

FEDERAL TRADE COMMISSION,

H. R. GIBSON, SR., ET AL, Petitioner, v. FEDERAL TRADE COMMISSION, Respondent,

Nos. 80-1743, 80-1746.

United States Court of Appeals, Fifth Circuit.

Aug. 13, 1982.

Petitions were filed to review final order of the Federal Trade Commission. The Court of Appeals, Brown, Circuit Judge, held that: (1) petitioners waived objection to participation of administrative law judge who had previously served as attorney advisor to the FTC Commissioner; (2) there was substantial evidence to support finding of group boycott; (3) there was sufficient evidence to support finding

of violation of the Robinson-Patman Act; and (4) FTC order was not overly broad.

Affirmed and enforced.

Petitions for Review of a Final Order of the Federal Trade Commission.

Before BROWN, COLEMAN and RUBIN, Circuit Judges.

As the curtain rises, the Gibsons appear before us once more for what we hope will be the final act in this almost 15 year drama starring the Gibsons, masters of discount merchandising, and the Federal Trade Commission (FTC). Unlike the earlier scenes of this Court[1], this time we are to arrive at the merits as we review the FTC's final order enjoining the Gibson Petitioners from

[1] In two prior cases we affirmed enforcement of FTC subpoenas, once during the investigative stage, FTC V. Gibson, 460 F.2d (5th Cir. 1972), and once following the subsequent issuance of an FTC complaint, FTC v. Gibson Products of San Antonio, Inc., 569 F.2d 900 (5th Cir. 1978). While the parties in these two cases and the instant case are not absolutely identical, the actions all stem from the same FTC investigation.

engaging in assorted trade practices. As the curtain falls, we affirm the order and direct enforcement.[2] No encores please.

Setting the Stage

In 1958 H. R. Gibson, Sr. and his wife Belva founded the first Gibson Discount Center in Abilene, Texas. From this beginning emerged a chain of over 500 retail discount stores operating in 29 states, and several small corporations providing certain support or related services to the retail stores. The scions of the family, H. R. Gibson, Jr., and Gerald P. Gibson, were actively involved in the family business, each owning interests in several of the retail stores, and eventually receiving the ownership interest of their parents.

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[2]"To the extent that the order of the Commission is affirmed, the Court shall thereby issue its own order commanding obedience to the terms of such order of the Commission." 15 U.S.C. §45(c).

A Family Affair or Who's Minding the Store

The Gibson retail discount stores are generally incorporated individually and include not only family owned and operated stores but also stores licensed to use the Gibson name.[3] In the period 1969 to October 31, 1972, Gibson, Sr., in addition to licensing various franchisees to use Gibson trade names in the operation of retail stores, operated a private trade show where manufacturers displayed their products to buyers for both Gibson-owned and franchised stores. During this same period, Gibson, Sr. and his wife Belva were majority stockholders in several Gibson retail stores and held a minority interest in certain other

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[3]As of December 31, 1976, 43 retail stores were controlled by individual members of the Gibson family and 614 licensed stores were operated under the Gibson trade name. The licensees pay a monthly fee for the use of the Gibson trade name.

retail stores. The store managers of the majority owned stores were hired by Gibson, Sr. who left the day-to-day operations largely to the store managers. During this same period, from 1969 to November 1, 1972, both Gibson sons owned retail stores.[4] The Gibson stores, family owned and franchised, collectively did approximately $1.6 billion in business in 1971.

On November 1, 1972, the Gibson businesses were reorganized so that Gibson, Sr. and wife Belva disposed of their ownership interest in both the franchising and retailing aspects of the family business,

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[4]Gerald Gibson owned Gibson stores in Paris, Texas, Shreveport, Louisiana and Bruton Terrace in Dallas, Texas, as well as minority interest in stores in Pueblo, Colorado, Garland, Texas and Temple, Texas. H. R. Gibson, Jr. owned the majority of stock in stores in Hutchinson, Kansas and San Antonio, Texas, as well owing some stock in stores located in Pueblo, Colorado, and the following cities in Texas: Richardson, Temple, Bruton Road in Dallas, Plano and Fort Worth.

transferring these to their two sons, Gibson, Jr. and Gerald Gibson. Gibson, Sr. sold the Gibson Products Company name to his sons and retained only the trade show business, registered as "The Gibson Trade Show". Gibson's, Inc., wholly owned by Gibson, Jr. and Gerald Gibson, was the corporate entity used to buy Gibson, Sr.'s retail business and continues to hold the stock of the retail stores. Gibson's Discount Centers, Inc., a subsidiary of Gibson's, Inc., actually carries on the retailing and franchise business.

Franchisees of the Gibson trade name are charged a monthly franchise fee and are subject to quality control by the franchisor.[5]

[5]The standard licensing contract of Gibson Discount Centers, Inc., the wholly owned subsidiary of Gibson's, Inc., in use since November 1, 1972, provides in part:

"9. GIBSONS shall in connection with this Agreement render such assistance to LICENSEE in connection with the operation

(footnote continued on next page)

Along with the use of the trade name, franchisees receive merchandising advice and most importantly are able to participate in the Gibson Trade Show.

(footnote 5 continued)
of his discount business as may be found appropriate by GIBSONS after request by LICENSEE, including advice as to merchandising and other business practices so as to enable the LICENSEE to benefit from the knowledge and experience of GIBSONS in the discount business.

10. LICENSEE agrees that GIBSONS retains the absolute, complete and final right of quality control over all products and items sold and over all services rendered by LICENSEE to customers of LICENSEE'S discount business and associated enterprises using the Service Marks and Trade Names licensed hereby to see that the high standards of GIBSONS DISCOUNT CENTERS throughout the United States of America are maintained and to protect the property rights of GIBSONS in the Service Marks and Trade Names set forth in Paragraph 1 hereof. The LICENSEE further agrees that if GIBSONS notifies LICENSEE that GIBSONS disapproves of the quality of products, items or services sold or rendered in connection with sale of items or products in the discount business of LICENSEE, that LICENSEE will immediately discontinue the sale of such items, products, and/or services, or will immediately improve such services so that they meet the standards of excellence maintained by GIBSONS."
ALJ opinion, p. 27-28

Tricks of the Trade

The Gibson Trade Show, an essential element in both the Gibson franchises and in the FTC complaint, is a private trade show produced by Gibson, Sr. The show, held approximately four times a year, is basically restricted to buyers for Gibson-owned and franchised stores. The show is the vehicle through which representatives of various suppliers can exhibit their products and attempt to obtain orders from various Gibson stores. A supplier or representative allowed booth space in the show in effect has authorization to sell his products to Gibson retailers but no guarantee that the franchisees will buy his products. Gibson, Sr. employs "merchandise managers" or "trade show buyers" to operate the show. The trade show buyers recruit manufacturers to participate in the show, discuss product lines, billing

terms and prices with suppliers, and negotiate with suppliers to get the best possible deal on the products that are to be shown. These buyers basically determine what suppliers are allowed to participate in the show as well as what products can be displayed. An integral part of the trade show operation is the show sheet (an order form and price list) which is filled out by the buyer after negotiations and indicates the price and terms for each product. These sheets, which are the exclusive order form used at the shows, are headlined "Ship to Gibson Products Company," followed by blank lines for the address of a particular store. In addition, they contain a notation instructing manufacturers not to ship at prices higher than those listed or a deduction will be taken. In return for the privilege of participating in the trade show, suppliers pay for booth rental,

related service fees and show fees. Show fees are generally based on a percentage of sales made at the Gibson Trade Show although some suppliers pay a flat fee. Suppliers who refused to pay show fees were generally not permitted to participate in the trade show.

Prologue

Although the FTC made a cameo appearance as early as 1967 when it first began investigating the Gibsons, it was not until February 1975 that it obtained star billing by issuing a three-count complaint alleging violations of the Federal Trade Commission Act and the Robinson-Patman Act against several Gibson-owned corporations, Gibson, Sr., his wife, and sons, Herbert and Gerald. Count I charged the petitioners with inducing suppliers to pay promotional allowances in connection with the Gibson Trade Show which were not proportionately

available to other customers of the suppliers, violating Section 5 of the FTC Act, 15 U.S.C. §45(a). Count II, also alleging violation of Section 5, concerned the boycott of suppliers who did not grant the promotional allowances charged in Count I. This count focused on the experience of three different suppliers, Toastmaster, Tucker Manufacturing Co., and Jeannette Glass Company. Count III alleged the payment of illegal brokerage in violation of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(c).[6] The focus of Count III was on

[6]Section 2(c) provides:

"(c) Payment or acceptance of commission, brokerage or other compensation. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with

(footnote continued on next page)

brokerage paid to Gibson, Sr. by two brokers, Barshell, Inc. and Al Cohen Associates, Inc., which successively represented Ray-O-Vac in sales to the Gibson stores.[7] After extensive pretrial proceedings and a ten-month trial, the ALJ issued a 235 page opinion, accompanied by a two and one-half page order. The ALJ dismissed Count I. Under Count II, the boycott of suppliers, the ALJ issued an

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(footnote 6 continued)
the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is so granted or paid."

[7]Barshell, Inc., originally charged in the FTC complaint, negotiated a consent settlement in 1976. Al Cohen Associates, Inc., charges solely in Count III, was dismissed by the ALJ after trial for failure by the FTC to prove the allegations of the complaint.

order against all respondents except Gibson's, Inc. Under Count III, the ALJ issued an order only against Gibson, Sr.

Both parties appealed the ALJ's decision to the Commission. The Commission affirmed the dismissal of Count I. It extended the order as to Count II to include Gibson's, Inc., finding that the boycott continued after November 1, 1972 under the management of Gibson's, Inc. and that it was proper and necessary to include Gibson's, Inc. in the order as the successor to the operations of a corporation found to be guilty of unfair trade practices. As to Count III, the Commission extended the provisions of the order concerning illegal brokerage to all Gibson family and corporate respondents on the basis of their complete interdependence and common control during the period of violations. The Commission's decision and accompanying order

issued on April 30, 1980. The petitioners filed motions for reconsideration in mid-June 1980, challenging certain aspects of the order. In addition, the respondents argued that certain actions taken by the Commission during periods of allegedly lapsed appropriations violated the Anti-deficiency Act, 31 U.S.C. §665(a), and thus required dismissal or remand of the case. The third ground for reconsideration, and the only one pursued beyond the Commission, is based on the alleged disqualification of the ALJ, von Brand, based on his earlier service as an attorney-adviser to former Commissioner MacIntyre. The petitioners allege that in light of the opinion of the Ninth Circuit in Grolier, Inc. v. FTC, 615 F.2d 1215 (9th Cir. 1980), von Brand should have been disqualified from serving as an ALJ and thus dismissal or remand of the case was necessary. The Commission

issued a further opinion and order denying the majority of relief sought.

Another Opening, Another Show

In seeking to have the FTC order set aside the Gibsons raise several challenges, not only in their case, but to the general administrative system developed by the FTC. In addition, they contend there is insufficient evidence on both the Count II boycott charge and the Count III Robinson-Patman charge. Although the arguments in both cases, that against Gibson, Sr. and his wife and that against the Gibson sons and Gibson corporations, are, like their briefs, almost identical, the Gibson sons and corporations also maintain that there is no evidence to connect them, as opposed to Gibson, Sr., with the allegations.

For openers, the Gibsons lead with their weakest argument, contending the FTC system of prosecution-adjudication deprives

them of their right to a fair trial and due process. Specifically, the Gibsons challenge the role of the Commission in investigating, adjudicating and reviewing complaints. "The Commission not only votes the complaint, but it determines by its adjudicatory powers what constitutes 'unfair' practices under Section 5." The Gibsons also challenge the role of the FTC attorney who coordinated the investigation in the pre-complaint period and then later served as "complaint counsel". The ALJ, a former attorney-advisor to Commissioner MacIntyre, also figures in to the "can't win" system of the FTC. Continuing their attack, the Gibsons assert that they have been before the FTC for 13 years, "awaiting this opportunity for a meaningful review by a fair and unbiased tribunal, a Court of Law." Finally, totally removed from any context, the Gibsons present a tirade

against the use of consent orders in general, relying on the testimony before a Congressional subcommittee of Fredric Scherer, a Director of the Bureau of Economics of the Federal Trade Commission.

[1-3] The FTC, however, clearly holds the trump in this hand, relying first on the Commission's organic legislation providing for the Commission to issue administrative complaints and subsequently sit as an adjudicative body. Federal Trade Commission Act §5(b), 15 U.S.C. §45(b). The combination of investigative and judicial functions within an agency has been upheld against due process challenges, both in the context of the FTC and other agencies. FTC v. Cinderella Career And Finishing Schools, Inc., 404 F.2d 1308, 1315 (D.C. Cir. 1968); Pangburn v. CAB, 311 F.2d 349, 356 (1st Cir. 1962); FTC v. Cement Institute, 333 U.S. 683, 700-03, 68 S.Ct. 793,

808-04, 92 L.Ed. 1019, 1035 (1948); Withrow v. Larkin, 421 U.S. 35, 51-56, 95 S.Ct. 1456, 1466-69, 43 L.Ed.2d 712, 726-28 (1975). Further, the participation of the staff attorney in both investigation and subsequent prosecution of a case is clearly allowed under 5 U.S.C. §554(d). Nor is there any merit to the Gibsons' contention that they were denied due process by the 13-year delay. First, although the initial decision to investigate the Gibsons occurred in 1967, the administrative complaint was not issued until 1975. Second, as the FTC points out, the delay must be credited in part to the Gibsons themselves. See, FTC v. Gibson Products of San Antonio, Inc., 569 F.2d 900 (5th Cir. 1978); FTC v. Gibson, 460 F.2d 605 (5th Cir. 1972). As to the argument that consent decrees are used for coercion, we find this point irrelevant since the Gibsons are not here

seeking to be relieved of a consent order and have failed to indicate how this argument has any connection with the merits of their own case. Forcing the Gibsons to choose between consenting to an order or incurring the burdens and expenses of a defense is inherent in the adversary process and is basically "part of the social burden of living under government." FTC v. Standard Oil Co., 449 U.S. 232, 244, 101 S.Ct. 488, 495, 66 L.Ed.2d 416, 427 (1980), quoting Petroleum Exploration, Inc. v. Public Service Commission, 304 U.S. 209, 222, 58 S.Ct. 834, 841, 82 L.Ed. 1294 (1938).

Changing Roles -- From Understudy to Lead

With FTC taking the first trick, the Gibsons next present their strongest and longest argument, that concerning the qualification of the ALJ in light of his

prior service as attorney-advisor to an FTC Commissioner.

The Gibsons' chief argument as to the administrative process concerns Theodor von Brand's metamorphosis from attorney-advisor to administrative law judge. Von Brand had served previously from 1963 through January 1971 as an attorney-advisor to former Commissioner Everett MacIntyre. In February 1977, at a prehearing conference, von Brand apprised counsel for Gibsons of his prior service with Commissioner MacIntyre. In a discussion off the record, as to which there is no real difference of view, von Brand indicated he had no recollection of anything coming across his desk while serving as attorney-advisor concerning the Gibsons and determined that the Gibsons had no objection to his continuing to serve as the ALJ in this case. Then, to avoid any future problem,

von Brand specifically put the following in the record.

Judge von Brand: "All right. The first thing I want to raise is something that I have raised off the record. I have informed counsel that in the period 1963 to 1970 I was legal advisor to Commissioner MacIntyre.

Now, it is my understanding that none of the respondents in this proceeding would raise an objection to my continuing in this case on that ground.

Is that correct, Mr. Odom [attorney for Gibson, Sr. and Belva Gibson]?"

Mr. Odom: "That's correct as far as I'm concerned, yes, sir."

* * *

Mr. Raider [attorney for Gibson sons and corporations]: "That's correct, Your Honor."

Subsequently, von Brand presided over the ten-month trial, during which no objection was raised concerning von Brand's qualification. On February 26, 1979, von Brand issued his initial decision and order. This decision was appealed to the Commission which issued a decision and order on April 30, 1980. Not until June 12, 1980 did the Gibsons seek von Brand's disqualification, in a petition for reconsideration of the Commission's order. The Commission, in an order of August 8, 1980, refused this relief. The basis for the Commission's decision was threefold: (1) failure by the Gibsons to file a disqualification motion and supporting affidavits as required by the Commission's rule §3.42(g)(2), 16 C.F.R. §3.42(g)(2); (2) failure to file a timely objection; (3) no demonstration or assertion of prejudice. In its opinion the Commission devoted substantial

attention to the Ninth Circuit opinion in Grolier, Inc.. v. FTC, 615 F.2d 1215 (9th Cir. 1980), discussed in more detail below.

The Gibsons' primary argument is that Section 5 of the Administrative Procedure Act (APA), 5 U.S.C. §554(d),[8] by prohibiting an "employee or agent" from performing

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[8]Section 554(d) provides:

"(d) The employee who presides at the reception of evidence pursuant to section 556 of this title [5 USCS §556] shall make the recommended decision or initial decision required by section 557 of this title [5 USCS §557], unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not --

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting

(footnote continued on next page)

"investigative or prosecuting functions" and also participating or advising in the decision, places on the adjudicative process limitations which are essentially jurisdictional, and in addition, cannot be waived. The Gibsons contend that an attorney-advisor as opposed to a Commissioner, is not exempt from the disqualification by 5 U.S.C. §554(d)(2)(C). To the Gibsons, the basic concern of §554(d) is

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(footnote 8 continued)

> functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title [5 USCS §557], except as witness or counsel in public proceedings. This subsection does not apply --
>
> (A) in determining applications for initial licenses;
>
> (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
>
> (C) to the agency or a member or members of the body comprising the agency."

(emphasis added).

the public interest in fairness, an interest that may not be waived. The Gibsons assert that their right to insist upon the disqualification of von Brand is "secondary to the public interest." Finally, in response to any criticism of the Gibson's delay in raising this issue, they maintain that the right of disqualification was not apparent until the Ninth Circuit decision in Grolier, supra.

Taking a Due from the Ninth

The Grolier case, so heavily relied upon by the Gibsons, actually involved the same ALJ. ALJ von Brand has served as an attorney-advisor to Commissioner MacIntyre during the period when Grolier was intermittently investigated and charged by the FTC. Records indicated that Commissioner MacIntyre had attended at least one meeting between Grolier and the representatives of the FTC. Grolier, upon learning of ALJ

von Brand's prior service to Commissioner MacIntyre, requested that the ALJ disqualify himself from further participation in the proceedings. Von Brand denied the request, stating that he did not recall working on matters involving Grolier while serving as a legal advisor. Grolier then filed a formal motion for disqualification and removal of the ALJ with the FTC and requested that the FTC permit discovery of certain FTC records which might reveal the nature and extent of the ALJ's contact with the Grolier case. Both the requested discovery and the motion for disqualification were denied by the FTC. In its petition for review in the Ninth Circuit, Grolier argued that the failure to disqualify ALJ von Brand violated both §554(d) of the APA and the Due Process guarantee of the Fifth Amendment. Grolier also alleged

error by the FTC in denying the requested discovery.

The Ninth Circuit, in an opinion issued January 24, 1980 as amended on denial of rehearing April 17, 1980, determined that the exemption under 5 U.S.C. §554(d)(2)(C) did not apply to ALJ von Brand once he was no longer an attorney-advisor. The Court specifically rejected the per se disqualification argument of Grolier that the ALJ was chargeable with knowledge of all investigative and prosecutorial activities undertaken by the FTC during his tenure as an attorney-advisor. In adopting a test focusing on the activity of the ALJ at the time that he serve as an attorney-advisor, the Ninth Circuit indicated that disqualification was necessary only if the ALJ "was sufficiently involved with the case to be apprised of ex parte information,..." Grolier, 615 F.2d at 1221. The Court also

placed the burden of showing the ALJ's prior acquaintance with ex parte information on Grolier, the party challenging the qualification of the ALJ. After determining that the FTC wrongly concluded that attorney-advisors do not perform "investigative or prosecuting functions" within the meaning of §554(d), the Ninth Circuit remanded the case to the FTC for reconsideration of the denial of discovery and in light of the results of that reconsideration, the disqualification motion. The Court very clearly indicated that the FTC did not necessarily have to grant discovery but it could not simply rely on a flat refusal to disclose anything concerning von Brand's involvement. The Court suggested that the FTC might initially respond through affidavits concerning the extent of von Brand's

involvement with the Grolier case while he served as attorney-advisor.[9]

The FTC's primary argument is that the Gibsons expressly waived the claim for disqualification during th pretrial proceedings and did not timely renew any claim. In addition, the FTC distinguishes the Grolier case on facts. In Grolier there was no express waiver of von Brand's continuing to preside. Grolier specifically objected to the ALJ's participation and filed a motion to disqualify the ALJ prior to the Commission's decision. Nor does the FTC believe that the statutory

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[9]The Ninth Circuit specifically did not reach the due process claim of Grolier, indicating that if von Brand is qualified, a more adequate record might be developed for the Court's determination of the due process claim.

Upon remand, the Commission denied the motion to disqualify von Brand and subsequently reissued its final order with modifications on March 9, 1982.

separation of functions requirement cannot be waived. Rather, the FTC contends that the Gibsons' decision not to raise the issue of the ALJ's disqualification in its appeal to the Commission or prior to the issuance of the Commission's opinion was a calculated litigation decision, one which paid off in part since von Brand in his initial decision dismissed the principal charge in the complaint. The rationale supporting the waiver of this technical procedural requirement is analogous to the rule imposed on litigants that points of error will not be considered for the first time on appeal unless manifest injustice will result. To the FTC there is nothing unfair in holding a party to an express, knowing waiver.

Prior to the Ninth Circuit opinion in Grolier, the FTC took the position that §554(d) did not apply to former attorney-

advisors since they did not perform investigative or prosecutorial functions within the meaning of that section. In reaching such an outcome, the FTC focused upon the Congressional desire to prevent adjudication by those who had developed a "will to win". In re Grolier, Inc., 87 F.T.C. 179 (1976). In reversing the FTC decision, the Ninth Circuit found an "equally important Congressional desire to prevent adjudicative interpretation of ex parte facts." Grolier, 615 F.2d at 1220 n.5. The Ninth Circuit, while rejecting the FTC position that §554(d) was not applicable to the situaion, specifically refused to accept the position here urged by the Gibsons and the ALJ was chargeable with knowledge of all investigative and prosecutorial activities undertaken by the FTC during his tenure as an attorney-advisor. Grolier, 615 F.2d at 1221. It

is obvious from the decision that the Ninth Circuit did not view the situation as fundamentally unfair or jurisdictionally void since it refused a per se disqualification rule, choosing rather to remand the case to determine whether Grolier could meet the burden of showing that von Brand had prior acquaintance with ex parte information. Thus the Ninth Circuit opinion in no way forecloses the possibility of waiver, a concept wholly compatible with placing the burden or establishing prior knowledge on the proponent. Without rejecting the opinion of the Ninth Circuit in Grolier, there is a clear distinction. In the Grolier case, Grolier clearly and vigorously raised the issue of von Brand's participation in a timely manner, both before the ALJ and the FTC. This is a far cry from the Gibsons' express waiver of any objection to von Brand's continuation

in the case after the ALJ's candid revelation of the facts.

The Waive of the Past

[4] We may agree, without deciding, that §554(d) applies to the situation of an attorney-advisor who subsequently serves as an ALJ. We do this because we hold that the Gibsons -- with explicit awareness of the facts or at least of the facts indicating the necessity for further factual inquiry open to them under FTC rules -- expressly waived any objection they might have. Not only did the Gibsons clearly indicate that they had no objection to von Brand continuing to preside in their case, they failed to raise at any meaningful point or in any meaningful way the issue of disqualification. Subsequent to the ALJ's opinion, the Gibsons in their appeal to the Commission did not mention the issue of disqualification. Nor did they

mention it at oral argument on the appeal or once the case was under advisement by the Commission. Even after the Ninth Circuit issued its opinion in Grolier, the Gibsons failed to direct the Commission's attention to this case or to raise this issue. Only after the Commission had issued its decision, one less favorable to the Gibsons than that of the ALJ, did the Gibsons indicate any objection to the ALJ's participation. If the Gibsons objected to von Brand's participation, at the minimum they should have preserved this objection three years earlier when they were asked specifically by the ALJ if they objected to his continued participation.

[5] Nor can we accept the Gibsons' argument that they were under no duty to raise the issue since the FTC had indicated in its Grolier decision that disqualification was not necessary. Because

the Gibsons expressly waived any objection, they are in no position to argue that a challenge to the ALJ's participation would have been fruitless. A party in an administrative proceeding, as in litigation in a court, has the duty and responsibility to bring to the attention of the agency an objection so that the agency has the opportunity to reconsider its position. This is no different than our requirement that a party provide the lower court with the opportunity to correct its errors by pointing out those errors to the District Judge first. It is certainly conceivable that von Brand would have recused himself in the case which had not yet gotten under way or that the FTC, if presented with other arguments, might have reconsidered its position in Grolier.

Nor are we convinced by the Gibsons' argument that they were afraid to raise

the issue of von Brand's participation for fear of antagonizing the ALJ. Counsel for Gibson, Sr. would have us believe that his reticence was based on his personal familiarity with the Grolier case, hearing on which were also being held in the Dallas FTC offices at the same time. We are not persuaded. Counsel for Grolier obviously harbored no such fear, filing timely an objection to von Brand's participation. Even if we were to acquiesce in this excuse for failing to raise the issue before von Brand, this argument offers no succor for the Gibsons' failure to raise the issue subsequently before the Commission. Certainly the Gibsons did not hesitate to contest the ALJ's opinion in other aspects, objections which called into question prior opinions of the FTC in other areas. Rather we are presented with a situation where, due to the fortuitous

intervening decision of the Ninth Circuit in Grolier, the Gibsons are not able to advance, retrospectively, an argument for disqualification of the ALJ. They are, however, unable to convince us of the applicability of Grolier to an express waiver of the kind involved here. The attempted end run around the need for timely objection through the argument of a situation analogous to exhaustion of remedies provides no yardage. While the Gibsons rely on Board of Education v. Harris, 622 F.2d 599 (2d Cir. 1979), cert denied sub nom, Hufstedler v. Board of Education, 449 U.S. 1124, 101 S.Ct. 940, 67 L.Ed.2d 110 (1981), that case specifically distinguishes the issue of exhaustion from waiver of objection.

Case law supports the concepts of timely objection with its complementary notion of waiver within the context of

disqualification under §554(d). In International Paper Co. v. Federal Trade Commission, 438 F.2d 1349 (2d Cir.), cert denied 404 U.S. 827, 92 S.Ct. 61, 30 L.Ed.2d 56 (1971), the Second Circuit, in considering alleged violations of due process and §554(d) based on the participation of the general counsel and other FPC employees both prosecutorial and decision making functions, found a waiver from the failure of a party to object timely.

> "Appellant made no timely challenge to this purported practice nor did counsel call it to the attention of the Commission at the time the stipulation of facts agreed to had been reviewed and approved by the Assistant General Counsel and General Counsel, before the supposed error was committed. This knowing inaction and calculated lying in wait, taken with the hope of upsetting a future adverse decision of the Commission, constituted a waiver of appellant's rights."

438 F.2d at 1357.

The D.C. Circuit in Democrat Printing Co. v. FCC, 202 F.2d 298 (D.C.Cir. 1952)

also found a waiver from the failure to raise a timely objection.

Aside from these specific interpretations of §554(d), the requirement for filing of a timely objection finds support in the language of §556(b) of the APA which provides: "On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case." The Ninth Circuit, in considering a motion for disqualification based on bias on the part of the Commissioner, in Safeway Stores, Inc. v. FTC, 366 F.2d 795, 802 (9th Cir. 1966), cert denied 386 U.S. 932, 87 S.Ct. 954, 17 L.Ed.2d 805 (1967), found that a motion was not timely where the objecting party had been silent during trial, briefing, and argument to the

Commission and had only raised the argument several months after the Commission issued an unfavorable decision. In Marcus v. Director, Office of Workers' Compensation Programs, 548 F.2d 1044, 1050-51 (D.C.Cir. 1976), the D.C. Circuit, while indicating that disqualification under §554(d) is mandatory, also stated:

> "The general rule governing disqualification, normally applicable to the federal judiciary and administrative agencies alike, requires that such a claim be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist. It will not do for a claimant to suppress his misgivings while waiting anxiously to see whether the decision goes in his favor. A contrary rule would only countenance and encourage unacceptable inefficiency in the administrative process. The APA-mandated procedures afford every party ample opportunity to enforce and preserve its due process rights."
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> 548 F.2d at 1051 (footnotes omitted).

See also Capitol Transportation, Inc. v. United States, 612 F.2d 1312, 1325 (1st Cir. 1979) (claim of bias on part of ALJ

first raised on petition for reconsideration after final order of agency.)

The Commission, in denying the Gibsons' motion for reconsideration, indicated that disqualification claims must be raised as soon as practicable and cited several cases in support. In addition, the Commission relied on its Rule of Practice §3.42(g)(2) governing the filing of disqualification motions.[10] The motion and supporting

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[10]Rule of Practice §3.42(g)(2) as in effect at the time provides:

> (g) Disqualification of administrative law judges
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> * * *
>
> (2) Whenever any party shall deem the Administrative Law Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, such party may file with the Secretary a motion addressed to the Administrative Law Judge to disqualify and remove him, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. If the Administrative Law

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affidavits must set forth the grounds for disqualification. The ALJ has ten days within which to disqualify himself. Should he not do so, he must certify the motion to the Commission which must determine promptly the validity of the claim. As the Commission indicated in its denial of the Gibsons' motion for reconsideration:

> "The requirement of affidavits [under Rules of Practice §3.42(g)], grounded in 5 U.S.C. §556 (1976), is not an empty formality to be cast aside unilaterally by a party to a Commission proceeding. There are many reasons for such a requirement. An affidavit provides an exact, sworn recitation of facts, collected in one place; a disqualification motion must not be made by a party, nor taken by the Commission,

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(footnote 10 continued)
Judge does not disqualify himself within ten (10) days, he shall certify the motion to the Commission, together with any statement he may wish to have considered by the Commission. The Commission shall promptly determine the validity of the grounds alleged, either directly or on the report of another Administrative Law Judge appointed to conduct a hearing for the purpose."

> lightly ..... Accordingly, the affidavit requirement serves not only to focus the facts underlying the charge, but to foster an atmosphere of solemnity commensurate with the gravity of the claim. Respondents' failure to submit affidavits is thus an independently sufficient basis to deny their petitions in this respect."

[6] This Court has implied a timeliness requirement within the context of disqualification claims in an analogous situation, that concerning judicial disqualification under 28 U.S.C. §455.[11]

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[11]Section 455 provides:

> §455. Disqualification of justice, judge, or magistrate
> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law, served

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In Delesdernier v. Porterie, 666 F.2d 116 (5th Cir. 1982), we found that a motion to

(footnote 11 continued)

during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

disqualify raised for the first time on appeal after two full trials on the merits was too tardy to consider. Looking to the policies underlying the disqualification of judges statute, we stated:

> "If disqualification may be raised at any time, a lawyer is then encouraged to delay making a §455(a) motion as long as possible if he believes that there is any chance that he will win at trial. If he loses, he can always claim the judge was disqualified and get a new trial. This result would not comport well with the purposes behind §455(a) .... Lack of a timeliness requirement encourages speculation and converts the serious and laudatory business of ensuring judicial fairness into a mere litigation stratagem."
>
> 666 F.2d at 121

See also In re International Business Machines Corp., 618 F.2d 923, 932 (2d Cir. 1980); United States v. Conforte, 624 F.2d 869, 879-80 (9th Cir.), cert denied 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980); Marcus, supra, and cases cited therein at n.21; Duffield v. Charleston

Area Medical Center, Inc., 503 F.2d 512, 515-16 (4th Cir. 1974). the same policies supporting timely objection or motions to disqualify judges are equally applicable to administrative law judges. A party should not be able to manipulate the rules by the use of an express waiver only to attempt later to avoid the effects of this waiver. Granted, as the Gibsons assert, "[w]hat is as stake here is not so much the right of an individual FTC Respondent ... but the public interest, the confidence of the public in the fairness of the adjudicative system of the FTC, and the entire administrative action of the FTC," we must emphasize that the public has an interest as well in conserving judicial and quasi-judicial resources and in ensuring the integrity of adjudicative process. Allowing a party to waive expressly an objection and then later seek to avoid it undermines

the integrity and and finality of administrative procedures.

[7] Finally, there is simply no indication of any manifest injustice or prejudice to the Gibsons from the participation of ALJ von Brand. The Commission, in denying the Gibsons' motion for reconsideration, also indicated that the Gibsons had not demonstrated or even asserted any prejudice, stating:

> "[O]ur review of the record convinces us that Judge von Brand was impartial in every respect, that his decision was thoroughly researched, and that his meticulous findings and conclusions were firmly and exclusively based on the record evidence. Of course, to the extent respondents challenged Judge von Brand's findings, conclusions, and proposed order, we undertook an exhaustive, independent review. In that review, we did not find that issues of demeanor or discretion were especially important in the determination of the case; thus, even if it were to be determined that Judge von Brand was disqualified, our decision of April 30, 1980 would not be void, as respondents have neither demonstrated nor suggested actual prejudice from his presiding, and we perceive none."

The lack of prejudice seems clear from the fact that the transactions forming the basis for liability challenged here occurred after 1971 when von Brand left the service of Commissioner MacIntyre. The only charge that could possibly rely on ex parte information, that in Count I, was dismissed by the ALJ. Nor have the Gibsons provided or even suggested the existence of any evidence that von Brand either possessed or relied on ex parte information. Unlike Grolier, the Gibsons did not even request discovery of what information ALJ von Brand would have had available to him, choosing instead to rely on the unsupported position that "It is accepted that the attorney-advisor ... is fully chargeable with whatever knowledge the Commissioner ... had of the Gibson pre-complaint matters before the Commission." The only support for this

position is a quote from former FTC Chairman Engman in which he stated: "I generally would charge an attorney-advisor with the same insider knowledge chargeable to his Commissioner." Even the Ninth Circuit in Grolier would not adopt such a broad position.

A Sufficient Toast

Act II opens with the Gibsons contending that there is insufficient evidence to support Count II, that of the boycott. Specifically, the Gibsons assert that there was no evidence to connect the Gibson sons and companies with the invitation to boycott letter, and no proof that a boycott actually existed. The Commission's finding that the Gibsons engaged in a group boycott, a per se violation of the antitrust laws, relies on the evidence of three companies who refused to meet the price terms demanded for participation in

the Gibson Trade Show, the Toastmaster Division of McGraw Edison Co. (Toastmaster), Tucker Manufacturing Co., and Jeanette Glass Co.

Toastmaster participated in the Gibson Trade Show from 1966 to 1970. At a meeting on June 22, 1970, Toastmaster's representative was asked for a payment of three percent of its sales volume to Gibson stores, which the representative refused. Toastmaster was informed that it was not "cooperating" and as a result of this lack of cooperation, it was unable to exhibit at the Gibson Trade Show from August 1970 through 1973. On January 22, 1971, the following letter on Gibson Products Company stationery was addressed to "All Stores" concerning Toastmaster.

> "The above company will not sell to us at a price we would recommend as being profitable and beneficial for your operation. We, therefore, no

longer recommend or authorize line, and suggest that you discontinue the same.

Please give this your attention, and we appreciate your continued cooperation."

Although Toastmaster continued its attempts to sell to the Gibsons stores, sales volume dropped sharply, from over $950,000 in 1970 to $297,000 in 1971. Toastmaster representatives were told on at least two occasions by franchised stores that they were declining to buy from Toastmaster because of the "All Stores" letter. In 1974, Toastmaster agreed to the terms for participation imposed by Gibson, Sr. and once again participated in the trade show. At this point, Toastmaster's sales to the Gibson stores increased.

Tucker and Jeannette had similar experiences. When negotiating for an exhibit at the February 1971 Trade Show, Tucker's representative refused to pay a two percent volume rebate and was excluded from

the Trade Show. On March 11, 1971, a substantially identical "All Stores" letter was sent by Gibson Products Company concerning Tucker. When Tucker representatives subsequently agreed to pay the rebate, the company was readmitted to the August 1971 Trade Show. Jeannette, directly and through its brokers, was asked for a five percent rebate, to be paid to Gibson, Sr. and not to individual stores. After it refused to make such a rebate, an "All Stores" letter was sent on March 30, 1971. Jeannette was refused readmittance to the shows without the five percent payment and was unsuccessful in attempting to sell to the family-owned stores, though it was able to make some sales to franchised stores.

The ALJ found the Gibsons liable on the Count II boycott charge. The Commission amended the ALJ's order to include Gibson's,

Inc., finding that the boycott continued after the November 1, 1972 change in management.

The Gibsons contend that there was no boycott and that the Commission failed to prove that the All Stores letter caused the decline in Toastmaster sales. The Gibsons offered several justifications for the All Stores letter in the Toastmaster case, including Toastmaster shipping policies during the Christmas season and dissatisfaction with the Toastmaster warranty program.

No R.S.V.P. Necessary

[8, 9] The All Stores letter concerning Toastmaster is, at the minimum, an invitation to boycott, specifically requesting that the stores refrain from dealing with Toastmaster. The letter is certainly stronger than that found sufficient in Eastern States Retail Lumber Dealers'

Association v. United States, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1914). Nor is it necessary for a group boycott that there be an express mutual agreement to refuse to deal. The contemplation and invitation for concerted action along with acquiescence is sufficient. From the evidence presented, the Commission found that a substantial number of stores had acquiesced in the request by Gibson Products Company. Although some of this evidence was in the form of hearsay testimony, the Commission Rules of Practice permit the introduction of hearsay evidence, provided that it meets the standards of materiality, reliability and relevance. See 16 C.F.R. §3.43(b); Resort Car Rental System, Inc., v. FTC, 518 F.2d 962, 963 (9th Cir.), cert denied 423 U.S. 827, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975). The evidence that Toastmaster representatives were told by

Gibson franchisees that there was a boycott, along with the actual letter and the substantial drop in sales by Toastmaster to the Gibson stores, amply support the Commission's findings of a group boycott.

Nor was the Commission bound to accept the Gibsons' alternate explanations for the drop in sales: dissatisfaction with Toastmaster products, preference of Toastmaster's sales representatives to sell to distributors instead of directly to retailers, and Toastmaster's lack of access to Gibson retailers, because of its non-participation in the Gibson Trade Show. The evidence concerning dissatisfaction with Toastmaster's warranty program related to the mid-sixties, several years prior to the boycott. The contention that Toastmaster preferred to sell to distributors is undercut by the testimony of Toastmaster's representative that he continued

his attempts to sell to individual Gibson stores even after the boycott began. As to the explanation that the drop in sales was due to non-participation in the Gibson Trade Show, this is merely a "which came first, the chicken or the egg" argument. The only reason Toastmaster did not participate in the Trade Show was its refusal to pay the requested rebate. The Commission failed to establish a legitimate business reason for the drop in Toastmaster's sales is also supported by the existence of two other All Stores letters, those concerning Jeannette and Tucker, which utilize substantially identical language. Each of the three suppliers refused at some point to pay the required rebate for participation in the Trade Show; each of the three letters is identical in purpose and effect.

[10] The Gibson sons and companies also contend that there is no evidence to connect them with the invitation to boycott. The All Stores letters, written on Gibson Products Co. stationery, clearly connect the Gibson sons with the action since Gibson, Jr. was president of that company and Gerald Gibson was executive vice-president. Given the overlapping ownership of the corporations and the essential purpose of the Gibson Trade Show to service Gibson stores, there was sufficient evidence that an order including all petitioners was necessary for effective relief. In addition, the Commission in amending the ALJ's order to include Gibson's, Inc., determined that the boycott continued under the management of Gibson's, Inc., a corporation wholly owned by the Gibson sons and used to buy Gibson, Sr.'s retail business.

[11-14] The findings of the Commission must be accepted if there is substantial evidence on the record considered as a whole to support them. FTC v. Standard Education Society, 302 U.S. 112, 117, 58 S.Ct. 113, 115, 82 L.Ed. 141, 145 (1937); FTC v. Algoma Lumber Co., 291 U.S. 67, 73, 54 S.Ct. 315, 318, 78 L.Ed. 655, 660 (1934). Where there is the possibility of drawing two inconsistent inferences from the evidence, the Commission may make the choice. Corn Products Refining Co. v. FTC, 324 U.S. 726, 65 S.Ct. 971, 89 L.Ed. 1338 (1945). In this case, the Commission, based on the All Stores letter and the testimony of Toastmaster's agent drew the inference that the substantial decline in Toastmaster's sales was as a result of the boycott, a determination which is supported by substantial evidence. The Commission's findings that the boycott of

Toastmaster continued until at least 1974 is also supported by substantial evidence. From this finding, the Commission determined that that the "institutional management" of the boycott, at least in the post-November 1, 1972 period was in the hands of Gibson's, Inc. There is also substantial evidence to support the Commission's determination that there was substantial commonality of interest prior to November 1, 1972 and that the operations of the Gibsons were sufficiently integrated to require an order covering all petitioners. The Commission, as discussed below, has wide discretion in determining the type of order necessary to remedy unfair practices.

Assault and Batteries on the FTC Order

In Act III, the Gibsons challenge the finding of the Commission of the payment

of illegal brokerage in violation of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. §13(c). Count III, the §2(c) charge, concerns the receipt of brokerage fees by Gibson, Sr., from two brokers representing the Ray-O-Vac Division of ESB, Incorporated (Ray-O-Vac), Barshell, Inc. and Al Cohen and Associates, Inc. The FTC tried the charge on the theory that Gibson, Sr. acted as a principal or buyer who split brokerage fees.

The Miller's Tale

Jim Miller was a broker employed by Ray-O-Vac to represent its products to the Gibson stores for approximately five years, years, from 1969 to January 1, 1974. Miller also owned all of the stock in Barshell, Inc., a distributor of health and beauty aid products, redistributing such products to various retailers and wholesalers throughout the southwest.

Beginning in 1971, Barshell became the sales representative of Ray-O-Vac, representing Ray-O-Vac to the Gibson stores. In this capacity, Barshell was to present Ray-O-Vac sales promotions to Gibson headquarters, conduct necessary negotiations, and have Ray-O-Vac's products listed. In return for these services, Barshell received a 10% brokerage fee. At the time that Barshell sold to the Gibson accounts, about 80% of Barshell's sales were to the Gibson stores. Ray-O-Vac sent commission statements to Barshell recording all of Ray-O-Vac's shipments to the individual Gibson stores and the commission which Barshell had earned on these sales. Miller testified that Gibson, Sr. frequently checked Barshell's commission statements, after which Barshell made payments to Gibson, Sr., termed promotional allowances, on the basis of sales recorded in the commission

statements. A Barshell check in the amount of $13,173.43, dated September 23, 1972, was introduced into evidence and Miller testified that this was a promotional allowance. The ALJ found that the check was a transmittal of brokerage fees by Barshell, received by Ray-O-Vac, to Gibson, Sr., when Gibson, Sr. was owner and operator of various retail stores and thus a buyer from Ray-O-Vac.

Al Cohen and Associates, Inc. acquired the Ray-O-Vac account effective January 1, 1974 to represent Ray-O-Vac to the Gibson stores. Al Cohen was also paid a 10% commission. In an oral agreement, Gibson, Sr. was to increase the sales volume of Ray-O-Vac and Cohen to pay Gibson, Sr. 90% of the 10% commission. Cohen made monthly payments beginning in 1974 to Gibson, Sr., which payments continued until at least March 1978. The ALJ, finding that Gibson,

Sr. was not a "buyer" at the time of the commission splitting with Al Cohen Associates, dismissed the complaint against Cohen.

The ALJ, while finding a violation of Section 2(c) by Gibson, Sr. as to Barshell, specifically found that the allegations against the Gibson sons had not been sustained and that the FTC had failed to tie the sons into the receipt of illegal brokerage. Apparently the FTC had intended to show stock ownership by Gibson, Sr., subsequently given to the Gibson sons, in another of Miller's companies. On this basis, the ALJ dismissed the Count III allegations as to the Gibson sons. The Commission, while upholding the Section 2(c) violation against Gibson, Sr., did not address the FTC's position that all of the Gibson respondents were a "single economic enterprise". Rather, the Commission

found that given the interdependence of the Gibson companies, for purposes of relief, there was ample justification to bind all Gibson corporate respondents and family members. The Commission specifically stated that they did not reverse the finding of the ALJ as to the failure by the FTC to tie the Gibson sons into the receipt of illegal brokerage. Rather the Gibson sons were placed under order for "fencing in" purposes.

[15] Ever ready to attack the FTC's order, the Gibsons challenge the Section 2(c) violation on several grounds. First, the Gibsons assert that the jurisdictional requirement of "sales in commerce" has not been met. The brokerage payments were allowances upon all Ray-O-Vac sales to Gibson retail stores, both family-owned and franchised, in a 20 state area. Thus the underlying sales were not merely

connected with, but directly in, interstate commerce.

Going for Broch

[16, 17] The Gibsons' second jurisdictional argument is that there was no showing of a discrimination in price. For support, the Gibsons rely on FTC v. Henry Broch & Co., 363 U.S. 166, 80 S.Ct. 1158, 4 L.Ed.2d 1124 (1960). First, Section 2(c) on its face absolutely prohibits the payment of brokerage except for services rendered and contains no requirement that a price discrimination occur. Second, Broch concerned variable brokerage fees charged for the purpose of creating discriminatory price advantages, rather than the situation here of a broker splitting part of his commission with the buyer. In fact, in Broch, the Supreme Court, in reviewing the legislative history of Section 2(c), stated:

> "One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of §2(c) of the Act."
>
> 363 U.S. at 169, 80 S.Ct at 1160, 4 L.Ed.2d at 1128 (footnote omitted)

We agree with the Commission Section 2(c), in light of the language and purpose, requires no price discrimination in a situation of dummy brokerage such as is involved here.

[18] The Gibsons also argue that there is no evidence that Gibson, Sr. was connected with buying so as to meet the statutory requirement of a "buyer". We find this argument without merit since the ALJ and the Commission found that, at least as to the check in September 1972, Gibson, Sr. was a buyer within the context of his personal ownership and operation of

individual retail stores, as well as in his role as head of Gibson Products Company.

Beauty Is Only Skin Deep

[19] Next the Gibsons maintain that there is no proof to support the Section 2(c) violation. Gibson, Sr. contends that the check issued on September 23, 1972 from Barshell, rather than being illegal brokerage, was an unrelated 3% commission due Gibson, Sr. for sales by the Gibson Trade Show of beauty and health products belonging to Barshell. Miller, Barshell's sole stockholder, identified the check in question as a payment of brokerage fees and also testified that Gibson, Sr. would periodically review Barshell's commission statements to assess a charge as his fee upon this commission. Lynn Lowe, a trade show buyer for Gibson, Sr., provided contrary testimony indicating that the

check was in payment for the trade show's sales of Barshell's health and beauty aids. The ALJ and the Commission found Lowe's argument would not wash. There was evidence that Miller sold his health and beauty aids not through Barshell, but through his other corporation, Progressive Brokerage. In fact, Miller testified that Barshell was formed specifically to be a housewares distributor and for that reason the Ray-O-Vac account moved through Barshell. The ALJ and the Commission were entitled to draw the inference that had the payments been for the purpose described by Lowe the check would have been made out by Progressive Brokerage, rather than Barshell. Although conflicting testimony was presented, there was substantial evidence from which the Commission could find a violation of Section 2(c). Our task is not to reweigh the evidence but only to

determine whether there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Steadman v. SEC, 450 U.S. 91, 99, 101 S.Ct. 999, 1006, 67 L.Ed.2d 69, 77 (1981), quoting Consolo v. FMC, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131, 140 (1966).

The Gibsons also claim that the payments in questions here are exempt from Section 2(c), falling within the "for services rendered" exception. We need not here decide whether this exception applies to payments made to a buyer because the Commission found, and we agree, that the Gibsons failed to provide adequate evidence to substantiate this claim. The Gibsons would have us believe that since they introduced evidence of Gibson, Sr.'s services in selling products of Barshell and since Barshell compensated Gibson, Sr.

by check and never asked for a refund, "the presumption then is that the services were reasonably worth the amount paid." This argument, however, fails to consider that the ALJ and the Commission found that the check in question had nothing to do with Gibson's services but rather was a payment for brokerage.

[20] The Gibsons' final contention is that there is no evidence to connect Belva Gibson or the Gibson sons with the Section 2(c) violation. The brokerage payments from Barshell to Gibson, Sr. were based on Ray-O-Vac sales to Gibson retail stores at a time when Gibson Products Company was wholly owned by the Gibsons. As the Commission stated:

> "The Gibson Products Company, through which Gibson, Sr. conducted the franchising, trade show and brokerage businesses, and the various corporate entities through which the Gibson-owned retail stores were operated were completely interdependent and under the

> control of the same few individuals in the Gibson family. For purposes of relief, in this environment, there is ample justification to bind all Gibson corporate respondents, except dissolved corporations, and all Gibson family respondents in order to insure that the order we issue today is not circumvented."

Don't Fence Me In

In this final act the Gibsons challenge the FTC order as overly broad. This argument also includes the assertions of lack of evidence to connect the Gibson sons and corporations with the boycott and Section 2(c) violations. They contend that the evidence used pertains only to Gibson, Sr. and that including the other petitioners is merely "guilt by association". The Gibsons also attack the order as arbitrary and overly broad by requiring notice to the FTC of change in employment for a ten year period and prior notification to the FTC of corporate acquisitions, reorganizations, etc.

[21, 22] The Commission clearly found that a broad order was necessary for effective enforcement in light of the interrelationship among the Gibson family members and corporations. "At least since November 1, 1972, there has been an enhanced potential for Gibson, Sr. to act as agent or intermediary for retail stores owned by other members of the Gibson family. Indeed, he owns no stores outright at this time, meaning that, leaving aside the possibility of treating all respondents as a 'single enterprise,' an order limited to Gibson, Sr. as a buyer might have little practical effect." The Commission has wide discretion in determining what type of order is necessary to remedy the unfair practices found. Jacob Siegel Co. v. FTC, 327 U.S. 608, 611, 66 S.Ct. 758, 760, 90 L.Ed. 888, 892 (1946); FTC v. National Lead Co., 352 U.S. 419,

428-29, 77 S.Ct. 502, 508-09, 1 L.Ed.2d 438, 444-45 (1957); Alterman Foods, Inc. v. FTC, 497 F 2d 993, 1001 (5th Cir. 1974). "[T]he courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." National Lead, 352 U.S. at 418, 77 S.Ct. at 508, 1 L.Ed.2d at 444. The use of a broad order within the context of interwoven corporate entities is within the Commission's discretion where the remedy is reasonably related to the violation. See, Sunshine Art Studios, Inc. v. FTC, 481 F.2d 1171 (1st Cir. 1973); Delaware Watch Co. v. FTC, 332 F.2d 745 (2d Cir. 1964). In this case where there is a substantial interrelationship among the Gibson family members and corporations, and where the trade show and franchising aspects overlap, the FTC order, by enjoining the Gibson sons, Belva,

and the corporations as well as Gibson, Sr., is reasonably related to the remedies sought, that is to restrain further violations of Section 2(c) and to block possible group boycotts of the type here found.

Pro Bono Publico

[23, 24] The Gibsons' swan song is that the order is not in the public interest. This chorus appears to rely on the contentions that the FTC failed to prove injury to competition or the existence of a "continuing practice". First, the violations at issue here are per se and thus do not call for extensive analysis of anticompetitive effect. The Commission has broad discretion in determining whether the public interest requires an order. Cotherman v. FTC, 417 F.2d 587, 594-95 (5th Cir. 1969). Nor have the Gibsons demonstrated that there is no risk

of repeated violations. The Commission specifically responded to the argument that no order was necessary since the practices were isolated.

> "Respondents cannot and do not contend that the law violations were inadvertent or that these practices were voluntarily abandoned, even after issuance of the complaint. Given the nature and structure of their business operation, which remains essentially unchanged, and given the absence of any evidence of abandonment, we find that an order is necessary to combat a cognizable danger of recurrence of the violations."

We find that the order, while broad, is reasonably related to the practices found to be in violation of the FTC Act and Robinson-Patman Act and that the FTC could conclude that these provisions are necessary to prevent future violations within the context of the interrelated corporate and family respondents. We bring down the curtain on this 15-year proceeding by ordering that the Commission's order be enforced.

AFFIRMED AND ENFORCED.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Filed: April 30, 1982

COMMISSIONERS:

Michael Pertschuk
Paul Rand Dixon
David A. Clanton
Robert Pitofsky
Patricia P. Bailey

In the Matter of	)	
	)	Docket No. 9016
HERBERT R. GIBSON, SR., et al.	)	

FINAL ORDER

This matter having been heard by the Commission upon the appeals of complaint counsel and respondents from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the initial decision with certain modifications:

IT IS ORDERED that the initial decision of the administrative law judge, pages 1-214, as amended, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent indicated in the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following Order to Cease and Desist be, and it hereby is, entered:

I.

IT IS ORDERED that respondents Herbert R. Gibson, Sr., individually doing business as Gibson Products Company and The Gibson Trade Show, Belva Gibson, Herbert R. Gibson, Jr., Gerald Gibson, individually and/or as officers of corporate respondents; and corporate respondents

Gibson's, Inc., Gibson's Discount Center, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc. and Gibson Products Co., Inc., their successors and assigns, officers, directors, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the operation of a trade show, the operation or franchising of any retailing business, or the operation of any business related to retailing in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

"1. Combining, agreeing, engaging in an understanding, or conspiring with any of said other respondents, or any other person, partnership or corporation, to

eliminate or boycott any supplier in order to prevent or hinder the supplier's sales to or business dealings with any of the respondents or any other person, partnership, or corporation, provided that nothing herein shall prevent respondents from acting collectively to further legitimate business decisionmaking with respect to businesses, including retail stores, which said respondents own collectively.

2. Coercing or intimidating any supplier in any manner to prevent such supplier from competing for the sale of any products to any retailer or any other person, partnership or corporation.

3. Representing directly or indirectly or implying to any supplier that the supplier may not compete for the sale of any products to any other person, partnership or corporation.

4. Taking any individual action to eliminate a supplier or to prevent or hinder the supplier's sales to or business dealings with any other person, partnership or corporation because such supplier does not appear in shows conducted with the Gibson Trade Show.

5. Recommending, suggesting or advising any retailer or any other person, partnership or corporation not to deal with a supplier because such supplier

does not appear in shows conducted by the Gibson Trade Show, or because such supplier is unwilling to meet the price, delivery, or billing terms demanded by respondent[s] or by any retailer or any other person, partnership or corporation.

II.

IT IS FURTHER ORDERED that Herbert R. Gibson, Sr., individually and doing business as Gibson Products Company and The Gibson Trade Show, Belva Gibson, Herbert R. Gibson, Jr., and Gerald Gibson, Gibson Products Co., Inc., Gibson's, Inc., Gibson's Discount Centers, Inc., their successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary,

division or other device in connection with the purchase of merchandise, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

1. Receiving or accepting, directly or indirectly, as a buyer or acting for or in behalf of or subject to the direct or indirect control of a buyer, from any seller or seller's broker anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names, including "Gibson Discount Center."

2. Assuming control of or influencing any seller or seller's broker to induce such seller or seller's broker to pay to respondent[s] anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names, including "Gibson Discount Center".

III.

IT IS FURTHER ORDERED that Count I of the complaint be, and it hereby is, dismissed.

IV.

IT IS FURTHER ORDERED that Count III

of the complaint be, and it hereby is, dismissed as to respondents Ideal Travel Agency, Inc., Gibson Warehouse, Inc., and Al Cohen Associates, Inc.

V.

IT IS FURTHER ORDERED that, for a period of 10 years from the date of service of this Order, each individual respondent named herein shall promptly notify the Commission of the discontinuance of his or her present business or employment and of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or

employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this Order.

VI.

IT IS FURTHER ORDERED that respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of which may affect compliance obligations arising out of the Order.

VII.

IT IS FURTHER ORDERED that respondents herein shall within sixty (60) days after service upon them of this Order file with the Commission a report in writing setting forth in detail the manner and

form in which they have complied with this Order.

By the Commission.

SEAL

/s/Carol M. Thomas
Secretary

ISSUED: April 30, 1980

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Michael Pertschuk
Paul Rand Dixon
David A. Clanton
Robert Pitofsky
Patricia P. Bailey

In the Matter of	)	
	)	Docket No. 9016
HERBERT R. GIBSON, SR., et al.	)	

OPINION OF THE COMMISSION

By Clanton, Commissioner:

The complaint in this case charges respondents with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45(a) (1976), and Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(c) (1976), stemming principally from the operation of the "Gibson Trade Show", one part from a network of respondent family enterprises. Individual members of the

Gibson family control corporations which own 43 retail discount stores, known as "Gibson Discount Centers"; a family corporation also licenses 614 other stores to operate under the Gibson name.[1] (ID 29). Together, the Gibson-owned and franchised stores combine to buy many of their products from suppliers at a quarterly private fete in Dallas, staged by the Gibson Family, and known as the Gibson Trade Show. (ID 60-61).

Count I of the complaint charges respondents with inducing the payment from suppliers of promotional allowances

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[1]The following abbreviations will be used in this opinion.

ID - Initial Decision Finding number
ID p. - Initial Decision page number
Tr. - Transcript page number
CX - Complaint Counsel's exhibit number
RAB - Appeal brief of Gibson, Sr.
CAB - Complaint Counsel's appeal brief

in connection with the Gibson Trade Show, which allowances were not available on a proportionally equal basis to other customers of these suppliers. This allegation, while maintained under Section 5 of the FTC Act, is patterned after and draws from Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. Count II alleges that respondents, in violation of Section 5 of the FTC Act, collectively boycotted suppliers who did not grant the promotional allowances charged in Count I. Finally, Count III is a distinct allegation of the payment of illegal brokerage in violation of Section 2(c) of the Clayton Act.

Administrative Law Judge Theodor P. von Brand (the "ALJ") dismissed Count I, issued an order against all respondents

except Gibson's, Inc., under Count II, and issued an order only against respondent Herbert R. Gibson, Sr. under Count III. Complaint counsel and respondents both appeal.

Respondent's Businesses

A description of the numerous Gibson corporate entities and the intertwining relationship among them and Gibson family members is set forth at length in the initial decision and will not be repeated here. (ID 1-117).

Briefly, the respondents are Herbert R. Gibson, Sr., ("Gibson, Sr."), individually and doing business as Gibson Products Co. and The Gibson Trade Show; his wife Belva Gibson ("Belva"); two sons, Herbert R. Gibson, Jr. ("Gibson, Jr.") and Gerald Gibson ("Gerald"); and eight corporations, five of which are

Gibson family controlled.[2] Of the remaining three corporations, two[3] negotiated consent settlements in 1976, and one, Al Cohen Associates, Inc., charged solely in Count III, is still in the case.

Gibson, Sr. founded the retail discount store chain and, until November 1, 1972, directed the franchising and trade show aspects of the family enterprise, doing business as the Gibson Products Company. (ID 3-4) Two other Gibson-controlled corporations, Gibson Warehouse, Inc., and Ideal Travel Agency, were used by Gibson, Sr. as vehicles to store and resell merchandise and to

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[2]Gibsons, Inc., Gibson Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc., and Gibson Products Co., Inc.

[3]Progressive Brokerage, Inc. and Barshell, Inc.

collect booth and show fees at The Gibson Trade Show. (ID 14-15).

As of November 1, 1972, a reorganization and change in operating control of various aspects of the family business was effected, essentially through a transfer of stock by Gibson, Sr. and his wife to a corporation, Gibson's, Inc., all of whose shares were owned by two of their sons, Herbert R. Gibson, Jr. and Gerald Gibson. This corporation now owns and operates the franchising and retail aspects of the family business. Gibson, Sr. retained the trade show business and, having sold the Gibson Products Company name to Gibson, Jr. (ID 16, 25), he registered the name, "The Gibson Trade Show", on November 1, 1972. (ID 26).

The Gibson Trade Show, upon which much of this case turns, is a private trade

show where manufacturers display their products to buyers for Gibson owned and franchised stores. (ID 59-61). The show provides the booth space from which the suppliers' representatives can show their wares and attempt to obtain orders.

Gibson, Sr. employs "merchandise managers" or "trade show buyers" to operate the show. These buyers recruit the participation of manufacturers to sell at the show. (ID 78). Buyers discuss product lines, billing terms and prices with suppliers, negotiating to get the best deal on the products to be shown. Upon the satisfactory conclusion of negotiations, a buyer fills in a "show sheet" with the price and terms for each product. These sheets, which are the exclusive order forms used at the shows (ID 90), are headlined "Ship To Gibson

Products Company", followed by blank lines for the address of a particular store. (ID 91). They contain a notation that items are not to be shipped at prices higher than those listed or else a deduction will be taken. (ID 93). The trade show buyers patrol the aisles and booths during the show, talking to suppliers' and retailers' representatives.[4]

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[4]In addition to the provision of booth space, the trade show provides meeting facilities and other services, including the opportunity for placement of "blanket orders," recommendations sent to Gibson stores to purchase particular items. (ID 98).

Suppliers are also solicited to advertise in Gibson tabloids, which are used by Gibson retailers as newspaper supplements or which are mailed out or posted in stores (ID 105). Participating stores purchase the finished tabloids from one of the Gibson family corporations; the tabloids are prepared and printed by G&G Advertising, a proprietorship run by

(footnote continued on next page)

Payments made by suppliers, and allegedly illegally induced by respondents, in connection with the trade show included the following, for each year from 1969 through 1972: (1) payment for booth rental, in an amount which was identical for all suppliers; (2) payment for services in connection with booth rental including, but not limited to electrical contractor services and furnishings; (3) payment for provision of personnel to prepare and attend the booth throughout the time The Gibson Trade Show was open; (4) payment for advertising in a Gibson

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(footnote 4 continued)
Gerald Gibson. (ID 107). Also, Gibson, Sr. at times sends letters to suppliers requesting that they advertise in particular tabloids. (ID 113-115). If an item is to be advertised in a tabloid, there is a sign on its suppliers' booth at The Gibson Trade Show which states "Recommended tab item".

tabloid; (5) special trade show prices on one or more of the suppliers' products offered for sale at The Gibson Trade Show; (6) special billing terms on all sales made at the trade show; (7) special allowances on sales made at the trade show calculated from a previously negotiated percentage of all such sales (the so-called "show fee").

The principal family business, from at least 1969 to November, 1972, from November, 1972 to the date the complaint issued in 1975, and to the present, was the ownership and operation of Gibson retail discount stores and the franchising of those stores. Both before and after the November, 1972 transfer, the franchise agreements promised the franchisee the benefit of Gibson volume purchasing and the advice on merchandise, but reserved to the franchisor the right

to order the discontinuance of an item or service if the quality was disapproved.

Participation in the Gibson Trade Show is a standard vehicle for manufacturers wishing to sell to Gibson retail stores. Few other retailers stage private trade shows, however, and accordingly, the complaint charges that the myriad payments made to the Gibson enterprises were not matched by similar payments or terms to the suppliers' other customers.

No additional facts are pertinent to Count I of the complaint; additional information needed to dispose of Counts II and III is set forth infra.

Count I

Count I of the complaint largely tracks the language of the Clayton Act

§§2(d) and 2(e)[5], as amended, and alleges that the Gibson family and corporate

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[5]Section 2(d), 15 U.S.C. §13(d) (1976), provides:

> "That is shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

Section 2(e), 15 U.S.C. §13(e) (1976), provides:

> "That it shall be unlawful for any person to discriminate in favor of one purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing of, any services or facilities connected with the processing, handling, sale, or offering

(footnote continued on next page)

respondents knowingly induced and/or received promotional payments and services in connection with the sale of products to Gibson owned and franchised stores in violation of Section 5 of the FTC Act.[6] The seven types of allegedly illegal allowances are those set forth supra.

The ALJ found that the variety of fees and special terms given by manufacturers to respondents were not within the purview

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(footnote 5 continued)
for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

[6]Although buyer misconduct is not a violation of Sections 2(d) and 2(e), this omission appears to be only a matter of congressional inadvertence. See Grand Union Co. v. FTC, 300 F.2d 92, 96 (2d Cir. 1962). Nevertheless, such misconduct is cognizable under Section 5 of the FTC Act. R. H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir. 1964).

of Sections 2(d) and 2(e), because they were in connection with original sale of a product, rather than in connection with its resale.[7] In his view, the allegations of Count I should have been brought under Section 2(a) for price discrimination. Complaint counsel, relying principally on Alterman Foods, Inc., 82 F.T.C. 298 (1973), aff'd, 497 F.2d 993 (5th Cir. 1974), which was distinguished by the ALJ, appeal.[8]

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[7]The ALJ found that the solicitation of fees for tabloid advertising was within the purview of Section 2(d). (ID 184). However, he held that complaint counsel had not sustained their burden of showing contemporaneous sales with respect to the items promoted in the tabloids (ID 189), and complaint counsel did not appeal from this holding.

[8]Complaint counsel have appealed from other holdings of the ALJ on this count of the complaint, but in light of our disposition of this threshold question, we do not reach these other issues.

Two features differentiate Sections 2(d) and 2(e) from the provisions of Section 2(a). The first is that the seller must either provide "services or facilities" or make payment in consideration of "services or facilities furnished by or through [the] customer." It has been held that the service or payment at issue must be promotional in nature, such as for advertising. See, P. Lorillard Co. v. FTC, 267 F.2d 439, 443 (3d Cir.), cert. denied, 361 U.S. 923 (1959). The second is that the payment made or service rendered must be in connection with the "processing, handling, sale, or offering for sale" of a product by the customer, i.e., it must bear a nexus to the resale or preparation for resale by the retailer. See, Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 678

(9th Cir. 1975). If these conditions can be met, the plaintiff may take advantage of Sections 2(d) and 2(e), which carry an easier standard of proof than does Section 2(a). Under Section 2(a), price discrimination is lawful, unless it may susbstantially lessen or injure competition and, inter alia, it is neither cost-justified, nor undertaken to meet competition. Sections 2(d) and 2(e) require no showing of competitive effect, nor do they allow resort to Section 2(a) statutory defenses, save perhaps the "meeting competition" defense. See E. Kintner, A Robinson-Patman Primer 270-72 (2d ed. 1979); Exquisite Form Brassiere, Inc., v. FTC, 301 F.2d 499 (D.C. Cir. 1961), cert. denied, 369 U.S. 888 (1962); but see Henry Rosenfeld, Inc., 52 F.T.C. 1535 (1956). Thus, Sections 2(d) and

2(e) "create a legal premium for the FTC or other plaintiffs to ease their evidentiary burdens." F. Rowe, Price Discrimination Under the Robinson-Patman Act 372 (1964).

The traditional use of Sections 2(d) and 2(e) has been in the realm of cooperative promotional arrangements. See, FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968). In the classic Section 2(d) and 2(e) case, a manufacturer has compensated a high volume retailer via a discriminatory plan, sometimes in an amount far in excess of that retailer's actual promotional costs, and in so doing has utilized a scheme not realistically available to small retailers. In addition, the manufacturer often rebates a "promotional allowance" to a retailer in an amount tied to the number of units resold by the

retailer to the public, but not linked to the retailer's actual promotional expenditures. Plainly, such a transaction is in connection with a resale and within the ambit of Sections 2(d) and 2(e). Similarly, making employees available or arranging with a third party to furnish personnel for purposes of performing work for a customer would also come within Sections 2(d) and 2(e). FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. §240.7, example 6 (1980).

Because of the easier threshold of proof carved out for Sections 2(d) and 2(e), the Commission and the courts have an obligation to ensure that the jurisdictional prerequisites of those sections are reasonably, and not expansively, construed. Accordingly, we will generally

find that Sections 2(d) and 2(e) apply to cooperative promotional arrangements. See Rowe, supra at 381 ("[T]he legal criteria of Sections 2(d) and 2(e), unless confined to the sphere of cooperative promotional arrangements, would cut across and confound the legal requirements of the separate price and brokerage provisions of the Act.")

The legislative history of Sections 2(d) and 2(e) evidences the relatively narrow scope that Congress intended these specific provisions to have. For example, Representative Utterback, Chairman of the Senate-House Conferees, stated that:

> "The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to

> the customer so favored as compared with others who have to bear the cost of such services themselves." 80 Cong. Rec. 9418 (1936).

And the Senate and House Judiciary Committee Reports also focus on "special allowances in purported payment of advertising and other sales promotional services, which the customer agrees to render with reference to the seller's products, or sometimes with reference to his business generally." S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15-16 (1936).

In keeping with this narrow scope courts have not hesitated to reject claims under Sections 2(d) and 2(e) which more properly should be brought under Section 2(a). Variations in credit terms

have consistently been held to present only a Section 2(a) issue, and courts have refused to allow such claims to be maintained under Sections 2(d) and 2(e). See, e.g., Robbins Flooring, Inc. v. Federal Floors, Inc., 445 F Sup. 4, 8 (E.D. Pa. 1977); Glowacki v. Borden, Inc., 429 F. Supp. 348, 353 (N.D. Ill. 1976). Likewise, discriminatory freight allowances have been held to be in connection with delivery on the original sale and as such within Section 2(a) rather than Sections 2(d) or 2(e), see Chigaco Spring Products Co. v. United States Steel Corp., 371 F.2d 428 (7th Cir. 1966), and other so-called delivery allowances have been held not to be in connection with resale and so to state a Section 2(a) rather than a Section 2(d) claim, Glowacki, supra at 358-59.

Furthermore, courts have recognized that the purpose of Sections 2(d) and 2(e) is to strengthen Section 2(a) by prohibiting outright hard-to-detect, disguised discrimination in the form of promotional allowances, thus forcing most discrimination into the open area of price allowances or discounts, where it can be measured and adjudicated under Section 2(a). FTC v. Simplicity Pattern Co., Inc., 360 U.S. 55, 68 (1959). In light of its salutary, but narrow, statutory purpose, the courts have, albeit not unanimously, resisted expanding the "scope of Sections 2(d) and 2(e) beyond the limited area of applicability intended by Congress," Cecil Corley Motor Co., Inc. v. General Motors Corp., 380 F. Supp. 819, 850 (M.D. Tenn. 1974); and see generally Skinner v. Unites States Steel

Corp., 233 F.2d 762 (5th Cir. 1956); New Amsterdam Cheese Corp. v. Kraftco Corp., 363 F. Supp. 135 (S.D.N.Y. 1973); David R. McGeorge Car Co., Inc. v. Leyland Motor Sales, Inc., 504 F.2d 52 (4th Cir. 1974), cert. denied, 420 U.S. 992 (1975).

There is some authority, however, for expanding the scope of Section 2(e). Centex-Winston Corp. v. Edward Hines Lumber Co., 447 F.2d 585 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972), cited by complaint counsel, held that preferential differences in the timeliness of delivery were within the purview of Section 2(e) because consistently faster deliveries would ultimately promote and facilitate resale. The very limited acceptance of this decision, see Glowacki v. Borden, supra at 356; Harlem River Consumers Cooperative, Inc. v. Associated

Grocers of Harlem, Inc., 371 F Supp. 701, 710 (S.D.N.Y.), aff'd, 493 F.2d 1352 (2d Cir. 1974) (dicta); Palmer News, Inc. v. ARA Services, Inc., 476 F. Supp. 1176, 1183 (D. Kan. 1979) (dicta), is outweighed by the strenuous criticism of its expansive view, see Rowe, Pricing and the Robinson-Patman Act, 41 Antitrust L.J. 98, 108-09 (1972); Cecil Corley Motor Co., Inc., supra at 851-852, and other courts have either rejected, id.; Buchannan v. Yamaha International Corp., 1977-1 Trade Cas. (CCH) ¶61,245 at 70,728-29 (D. Ore. 1976), or distinguished the decision, David R. McGeorge Car Co., supra at 55; Purdy Mobile Homes, Inc. v. Champion Home Builders Co., 594 F.2d 1313, 1317-18 (9th Cir. 1979). Indeed, it is not entirely clear whether the Seventh Circuit continues to hold firmly to its Centex-Winston

decision. See Kirby v. P. R. Mallory & Co., Inc., 489 F.2d 904, 910 (7th Cir. 1973), cert. denied, 417 U.S. 911 (1974); Harper Plastics, Inc. v. Amoco Chemicals Corp., [1980] 5 Trade Reg. Rep. (CCH) ¶63,229 at 78,126-27 (7th Cir. March 17, 1980); but cf. Glowacki, supra at 356. In Kirby, which dealt with advertising allowances, the court reaffirmed the accepted distinction between payments and services in connection with the original sale, which are challengeable only under Section 2(a), and those with a connection to the resale, which are cognizable under Sections 2(d) or 2(e). The court then concluded:

> "In view of the strict standards of §§ 2(d) and 2(e), which focus on resale, it appears quite clear that Congress carefully considered the deficiency in the original law proscribing price

> discrimination in the supplier-customer sale and drafted §§2(d) and 2(e) to apply exclusively to promotional discriminations like those alleged in this case." 489 F.2d at 910-11

Whatever vitality remains in the Centex-Winston decision, it does not contravene the general standards which we bring to bear upon the facts of this case.

Against this legal background, we approach our earlier decision in Alterman Foods, Inc., supra. Unlike the ALJ, we are unable to discern a principled basis upon which to distinguish that case from the one at bar. In a factual setting quite similar to the instant case, Alterman held that discriminatory payments to a private trade show were, in fact, unlawful promotional allowances under Sections 2(d) and 2(e) of the Clayton Act. In finding that the Alterman food

show had induced suppliers to violate Sections 2(d) and 2(e), the Commission relied upon two kinds of benefits which had accrued to the Alterman retail operation. These benefits were described as "[d]irect in the sense that profits from booth rentals enhanced the financial position of the respondent, and indirect in the sense that the suppliers' booths, displays and demonstrations at the food show were intended to aid in and promote the product's resale to the consuming public." 82 F.T.C. at 343.

After careful reexamination of our decision in Alterman, we conclude that its reasoning is flawed and, henceforth, we decline to follow it. Specifically, we do not judge the "benefits" recited in Alterman, which are relied upon by complaint counsel, to be sufficiently related

to the promotional allowance and resale requirements of Sections 2(d) and 2(e) to trigger application of those provisions.

Undoubtedly, the products purchased by Gibson retail buyers from manufacturers at the trade show were intended for resale to the ultimate consumer. But this fact standing alone is insufficient to transform what is plainly the original sale into one that is in connection with resale. To the extent that Gibson entities received booth rentals and Gibson buyers received price concessions not available to the competing customers, an action may lie under Section 2(a). But to focus on the translation of these "direct benefits" down to the next level of competition, i.e., to rely on financial strength of the company, enabling Gibson retailers to undercut competitors

on subsequent resales, is to misapply the statute.[9] "Benefits" of this sort are inherent in any transaction in which goods are ultimately destined for resale, and to accept the Alterman holding would mean opening up Sections 2(d) and 2(e) to practices that Congress intended to be challenged solely under Section 2(a).[10]

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[9]Of course, an examination of such direct benefits ab initio may be necessary to determine whether there has been discrimination among competing customers. See Kintner, supra at 254. But even if we assume for purposes of this discussion that all seven categories of alleged discriminatory payments, including the show fees, inured somehow to the benefit of the Gibson retailers, that does not automatically bring such payments within the purview of Sections 2(d) or 2(e). Although it is not entirely clear, it appears that the Commission in Alterman analyzed the direct benefits in terms of both the discrimination and resale issues.

[10]Our holding is not inconsistent with R. H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir 1964), in which Macy's solicited

(footnote continued on next page)

As to the "indirect benefits" identified in Alterman, we believe they play a role too incidental in the overall transaction here to warrant applications of Sections 2(d) and 2(e). In general, marketing assistance, if discriminatorily granted, does run afoul of Sections 2(d)

(footnote 10 continued)
vendors to contribute $1,000 apiece to help defray advertising and promotional costs of its 100th anniversary celebration. While Complaint counsel would read Macy as proscribing the receipt of payments as "general revenue", in fact the court specifically found that Macy's used the contributions for advertising purposes:

> "Macy's used the payments for institutional advertising and promotions to get more people into its stores to buy the goods of all its vendors. The payments by the contributing vendors were thus in consideration for services or facilities furnished by Macy's in connection with the offering for sale of the vendor's goods." Id. at 450.

and 2(e). But in the present case, it is clear that the principal function of the trade show was to funnel a high volume of products from manufacturers to participating retailers at a discount price, and not to provide promotional assistance. While various suppliers may have laid out their merchandise and demonstrated their products as complaint counsel contend (CAB 22), and while suppliers may even have discussed selling techniques with would-be buyers, plainly the suppliers' principal purpose in engaging these acts was to induce retail store buyers to make the original purchases, not to provide marketing or promotional assistance to them.[11] Moreover, no real showing has been made that retailers received

[11] In Elizabeth Arden, Inc. v. FTC, 156 F.2d 132 (2d Cir. 1946), cert. denied,
(footnote continued on next page)

"services or facilities" furnished or underwritten by suppliers beyond completion of the original sale. We do not mean to suggest that trade shows are free of the constraints of Sections 2(d) and 2(e) insofar as they facilitate promotion upon resale, but rather we will look realistically at transactions as a whole before deciding to apply Sections 2(d) and 2(e), the narrower statutory provisions, instead of Section 2(a). In this case, the sundry fees paid by suppliers at the trade show were, at bottom, little

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(footnote 11 continued)
331 U.S. 806 (1947); and Exquisite Form Brassiere, Inc. v. FTC. 301 F.2d 499 (D.C. Cir. 1961), cert. denied, 369 U.S. 888 (1962), for example, manufacturers' employees were utilized to demonstrate product use to customers at retail outlets. The marketing assistance in the instant case, by contrast, was no more than a tangential element of the transaction.

more than reductions in price necessary to induce Gibson retailers to make the original purchase of the products.

We believe this result comports most closely with the intent of Congress and meaning of the statute. Accordingly, Count I, which rests on too expansive an interpretation of the jurisdictional requisites of Sections 2(d) and 2(e) of the Clayton Act, is dismissed.

Count II

Few manufacturers could resist the subtle persuasion of Herbert R. Gibson, Sr. to participate in the Gibson Trade Show. And, indeed, as Gibson, Sr. would point out, matters had been arranged so that the Gibson Trade Show was a very important vehicle for selling to Gibson retail stores. The trade show afforded suppliers a unique opportunity to exhibit their wares to a multitude of Gibson

retail stores at once. On occasion, however, Gibson, Sr. and would-be trade show participants, such as Toastmaster Division of McGraw Edison Company, would have a disagreement over the sundry fees to be paid by the exhibitor.

Toastmaster had participated in Gibson trade shows from 1966 to 1970, but in 1970 was unable to agree with Gibson buyers on terms for its future participation. (ID 379, 384-86). On January 22, 1971, a letter was sent out to "All Stores" by two buyers from the Gibson Products Company, Tommy Perkins and Bobby Regeon, concerning Toastmaster. (CX 104). It read:

> "The above company will sell us at a price we would recommend as being profitable and beneficial for your operation. We, therefore, no longer recommend or

> authorize this line, and suggest that you discontinue the same.
>
> Please give this your attention, and we appreciate your continued co-operation."

Similar letters, signed by Tommy Perkins, were sent out on March 11, 1971 and March 30, 1971 concerning Tucker Manufacturing Co. and Jeannette Glass Co., respectively. (CX 303, CX 136). There was evidence as well of other direct and indirect communications to Gibson-owned and franchised stores suggesting they not purchase from designated suppliers.

Toastmaster sales to Gibson-owned and franchised stores, which had amounted to $953,656 in 1970, plummetted to $269,778 in 1971. (ID 390). Tucker and Jeannette sales also fell sharply following the Perkins letters. (ID 398-99, 408).

Despite efforts by Toastmaster representatives to sell directly to individual Gibson franchised stores, sales remained depressed for two additional years. In 1974, Toastmaster met with Gibson, Sr.'s terms for participation in the trade show, and its sales to Gibson stores went up. (ID 392).

The ALJ found that the Gibson family respondents and the Gibson corporate respondents, in combination with some or all of the Gibson family owned stores and Gibson franchised stores, had maintained an illegal boycott of suppliers who would not grant the special allowances demanded on sales during or incident to the trade show. He found that respondents had induced Gibson franchised stores to stop buying from specified suppliers in order to coerce those suppliers into paying

increased show fees to Gibson, Sr. for participation in the trade show. All Gibson family respondents were placed under order, as they were officers and directors of Gibson Products Company (ID 9), the name under which the trade show operated until November 1, 1972.[12] The order also binds all Gibson corporate respondents, save Gibson's, Inc., which was not in existence when the boycott began. Inclusion of these respondents was premised on the ALJ's finding of mutual interdependence and integrated operation among all Gibson corporate and family respondents.

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[12]Belva Gibson appeals from inclusion in the boycott finding and order, claiming she did not actively participate in the boycott. In light of the fact that Belva Gibson was an officer and director of the Gibson corporate respondents, except for Gibsons, Inc., we find that she was properly included in the order.

Respondents appeal, contending that the evidence is insufficient to sustain a finding that there was a boycott. Respondents argue that there is no evidence that specific retailers ceased buying Toastmaster products because of the January 22, 1971 letter; that it was improper for the ALJ to find a drop in Toastmaster sales from 1970 to 1971; and, finally, that it was improper for the ALJ to infer a boycott from the drop in sales. Complaint counsel appeal from the ALJ's refusal to include Gibson's, Inc. in the order. For the reasons discussed below, we agree with complaint counsel.

Group boycotts generally are per se violations of the antitrust laws. "[C]ertain agreements or practices ... because of the pernicious effect on competition and lack of any redeeming virtue

are conclusively presumed to be unreasonable and therefore illegal ... [G]roup boycotts are of this character." United States v. General Motors, 384 U.S. 127, 146 (1966).[13]

The rule of per se illegality has been applied to three types of group boycotts: (1) horizontal combinations of traders at

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[13]We are not unaware of decisions applying the rule of reason to conduct that was alleged to be a "boycott", see, e.g., Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970). But the considerable differences between the conduct in those cases and conduct traditionally proscribed under a per se standard suggests that there may be no real inconsistency in approach. See Sullivan, Handbook of the Law of Antitrust 256-59 (1977). In any event, the facts of the instant case fall well within existing per se decisional law, and hence we have no occasion to explore the precise dividing line between per se illegal boycotts and arrangements that should be examined under the rule of reason. See generally St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 542-43 (1978).

one level of distribution, the purpose of which is to exclude direct competitors from the market; (2) vertical combinations of traders at different marketing levels, the purpose of which is to exclude competitors of some members of the combination; and (3) combinations "designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors." E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, 467 F.2d 178, 187 (5th Cir. 1972), cert. denied, 409 U.S. 1109 (1973). See also United States v. General Motors Corp., supra; Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457 (1941); Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119, 127 (8th Cir. 1973), cert. denied, 415 U.S. 918 (1974).

The conduct at issue here plainly falls within the third category noted above. The boycott victims all refused to pay or increase the percentage paid to Gibson, Sr. as a show fee for participation in the Gibson Trade Show. In order to induce these firms to pay the demanded amount, Gibson Products Co. requested Gibson owned and franchised stores to stop buying their products, thus denying them access to the Gibson market. This action manifests both exclusionary and coercive conduct, thereby exhibiting rather clear anticompetitive effects. And respondents' utilization of their status as franchisor to Gibson stores for the purpose of coercing firms to participate in the trade shows at a price they were unwilling or unable to pay admits of no redeeming virtue.

Respondents' appeal, premised almost exclusively on factual grounds, is unpersuasive. The letters to Gibson stores were plainly invitations to boycott.[14] On their face, these letters went significantly further than the communications in Eastern States Retail Lumber Dealers' Association v. United States, 234 U.S. 600 (1914), the circulation of which was to be a violation of §1 of the Sherman Act. The Eastern States letters contained no request to refrain from dealing, but merely set out the names and addresses

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[14]The ALJ found that respondents' testimony that the letter regarding Toastmaster was sent out only to those stores which had already complained about Toastmaster products was not credible, and we agree. The record compels the finding that "All Stores" meant just that, and that the letter was received, or intended to be received, by all stores operating under the Gibson name, both franchised and family-owned.

of wholesalers who also sold at retail. The Supreme Court found, in light of the record in that case, that the circulation of such information had the "natural effect of causing such retailers to withhold their patronage from the concern listed." 234 U.S. at 609. And the letters in this case contained the very suggestion of incitement and mutual action that was found lacking in the case relied upon by respondents, Modern Home Institute v. Hartford Accident & Indemnity Co., 513 F.2d 102, 112 (2d Cir. 1975).

Neither does the fact that there was no express mutual agreement to boycott vitiate the finding of a collective refusal to deal. See Eastern States, supra at 608-609. It is sufficient that knowing concerted action was contemplated and invited, the stores adhered to the

request.[15] Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226 (1939); FTC v. Cement Institute, 333 U.S. 683, 716 n.17 (1948). All stores which received the letter are chargeable with knowledge that concerted action was at least contemplated, see Interstate Circuit, supra at 222, and it is evident from sales data and corroborative testimony that a very substantial number of stores did participate in the scheme.

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[15]The fact that the letters were sent out on Gibson Products Company stationery, the name under which Gibson, Sr. granted the stores their franchises, itself suggests the presence of considerable inducement to the franchisees to comply. Roy Love, a franchisee in Oklahoma City, clearly had this is mind when he told Toastmaster's representative, after receiving his copy of the letter, that "if he wanted to keep his sign out in front of his store, saying 'Gibson's', he had to go by what Seagoville [Gibson management] ordered or told him to do." (Tr. 3466)

Each of the four documents in this exhibit contains two charts. The first is labeled "Monthly Dollars", the second "Cumulative Dollars". On both charts each row is labeled with a month and each of the first eleven columns is labeled with a product. The twelfth column is labeled "other appliances" and the last column is labeled "total". It is equally clear that each figure in the "Total" column of the Cumulative Dollars chart represents the cumulative total of all products sold in the preceeding months. Consequently, the last figure in the "Total" column of the chart represents the sale of all products through December, or the total for that year. Respondents have advances no alternative interpretation of this figure, and indeed, the chart will support none. We

thus find respondents' argument in this respect to be utterly without merit.

Respondents, citing the general rule against admissibility of hearsay, also object to reliance on testimony and memoranda by Toastmaster representatives who recalled being told by Gibson franchisees that, essentially, they were under boycott. (See Tr. 3464-66, CX 106A). Hearsay evidence is admissible, however, in FTC adjudicative proceedings, provided that it meets the standard set out in our Rules of Practice §3.43(b), viz., that it be "relevant, material, and reliable." Resort Car Rental System, Inc. v. FTC, 518 F.2d 962, 963 (9th Cir.), cert. denied, 423 U.S. 827 (1975). In this case, the proffered evidence is consistent with and corroborative of other facts in the record. While we would attach less weight to hearsay

evidence standing alone, under the circumstances presented here we see no reason to exclude it or ignore it.

Respondents' final argument is that even if Toastmaster sales to Gibson stores did drop, the decline was more likely attributable to factors other than the boycott, viz., dissatisfaction with Toastmaster products, an asserted preference by Toastmaster's representatives to sell to distributors instead of directly to retailers, and Toastmaster's lack of access to Gibson retailers because of its non-participation in the Gibson Trade Show.[16]

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[16]Respondents Gibson, Jr. and Gerald also contend that retail stores in which they were financially interested did not participate in the boycott. These respondents have offered little evidence to rebut this respect, however. In any event, since responsibility for sending

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We agree that an inference of conspiracy should not be drawn where other inferences are equally plausible, First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 280 (1968), but respondents clearly fail to make this showing.

Although respondents offered testimony on complaints received about Toastmaster's shipping policies at Christmas time (Tr. 6639), there was no evidence that any store stopped buying Toastmaster goods due to these problems, nor did the witnesses themselves suggest that this was the case. Furthermore, respondents' claim that dissatisfaction with Toastmaster's warranty program contributed to the

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(footnote 16 continued)
the boycott invitations may be attributed to these respondents, the question of their stores' acceptance of their invitations is essentially immaterial.

decline in sales is supported only by the testimony of one witness, who stated that such dissatisfaction caused him to discontinue the Toastmaster line sometime in the mid-1960's. (Tr. 7893-94). No evidence is offered that this caused any store to discontinue buying Toastmaster goods in 1970-1971. The additional claim that Toastmaster's failure to live up to its commitments caused the decline is supported only by testimony from the witness who claimed he stopped buying this line of goods during a period of time when he was not working for any Gibson discount store but for another store altogether (Tr. 7938-39). All of this evidence fails to establish that any Gibson store stopped buying Toastmaster products in the relevant period for any of the suggested reasons.

The second explanation offered, that Toastmaster's representative preferred selling to distributors, and that he did not want to increase his sales to Gibson stores (Tr. 3507-08), also fails to find support in the record. No evidence was offered to establish a decision on that representative's part to stop selling to Gibson stores. Nor could it be inferred that because he did not wish to increase sales that he, therefore, wished to decrease them. By contrast, his own testimony indicates that he continued to try to sell to individual Gibson stores, even after the January 22, 1971 letter. (Tr. 3464-65).

The last alternative explanation, which cites Toastmaster's non-participation in the trade show as the cause of its decline in sales, is rather ironic, since

it was Toastmaster's refusal to accept Gibson, Sr.'s demand for increased trade show participation fees which led to its being blacklisted in the first place. Even if we were to dignify this argument by full consideration of it, however, we would have to conclude that it is not adequately supported by the record. Respondents proffered no direct evidence of the impact, in the absence of a boycott, that non-participation in the trade show would have on a firm's ability to sell directly to individual Gibson stores. Without any indication of the magnitude of this impact, we cannot infer that non-participation in the trade show alone could have caused such a sharp drop in Toastmaster sales in 1971.

Respondents have failed to establish the existence of legitimate business

reasons on the part of Gibson retailers, wholly distinct from their receipt of the boycott letter, which would account for the sharp drop in Toastmaster sales. Cf., DuPont Glore Forgan, Inc. v. American Telephone & Telegraph Co., 437 F. Supp. 1104, 1126 (S.D.N.Y. 1977), aff'd mem., 578 F.2d 1367 (2d Cir.), cert. denied, 439 U.S. 970 (1978). Neither are we persuaded that this drop in Toastmaster sales was "mere chance." Interstate Circuit, supra at 223. Respondents' actions and their consequences cannot be explained by alternate inferences that can be drawn from the record, and in light of the specific invitation to boycott and the subsequent evidence as to the effects of the invitation, we find that respondents have violated Section 5 of the FTC Act by engaging in an unfair method of competition,

viz., a group boycott.[17] We find further that, despite a modest rebound in Toastmaster sales to individual Gibson stores in 1972 and 1973, this boycott plainly continued until at least 1974 when Toastmaster capitulated to the demands of Gibson, Sr.'s representatives for higher fees for participation in the Gibson Trade Show. (ID 392). We note also that Respondents have offered no evidence to show that the boycott was discontinued prior to 1974.

The ALJ, finding that the individual and corporate Gibson respondents comprised a single entity, issued an order on this count of the complaint binding all of them,

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[17] Indeed, under these circumstances an invitation to boycott, irrespective of its actual effects, might violate Section 5 if the soliciting party has a reasonable expectation that the invitation will be accepted and acted upon.

save Gibson's, Inc. Without necessarily agreeing that there was complete unanimity of interest among all respondents under the pre-November 1, 1972 organizational structure of the Gibson family business, we conclude that the ALJ was correct in placing all such respondents under order.

First, substantial commonality of interest was demonstrated, especially in the pre-November 1, 1972, environment. The ALJ found that all individual respondents, including Gibson, Jr. and Gerald, were officers of Gibson Products Company, the franchisor corporation, with authority broad enough to include knowledge and approval of the dissemination of the boycott letters. Inclusion of the corporate respondents was correctly premised on the ALJ's finding of their mutual interdependence and on the interdependence

among the corporate and individual respondents collectively. It is not necessary for this purpose to determine, as the ALJ did, that all respondents were part of a single enterprise in the pre-November 1, 1972 period.

Second, respondents' operations are sufficiently integrated that an order embracing all of them is necessary to insure the effectiveness of the relief we have directed. Some fencing in to prevent circumvention of Commission orders is appropriate and lawful, see Sunshine Art Studios, Inc. v. FTC, 481 F.2d 1171 (1st Cir. 1973); Delaware Watch Co., Inc. v. FTC, 332 F.2d 745 (2d Cir. 1964), and where, as here, it has been shown that respondents' operations

are closely integrated, it is probably indispensable.[18]

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[18]Respondents object also to the entry of an order against the lot of them precisely because they are so closely interwoven, on the ground that corporations cannot conspire with their own subsidiaries, affiliates, or officers. Knutson v. Daily Review, Inc., 383 F. Supp. 1346 (N.D. Cal. 1974), modified, 401 F. Supp. 1374 (N.D. Cal. 1975), modified, 548 F.2d 795 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977). It is contended, for example, that Gibson, Sr., and his wife could not have conspired with the corporate respondents because they owned a controlling interest in each. Without discussing the permutations of who amongst the Gibson corporate and family respondents could be held to have conspired with whom, we simply note that concerted action between related corporations which has the purpose of effect of unreasonably restraining the trade of unrelated third parties is highly suspect under the intra-enterprise conspiracy doctrine. See, e.g., American Bar Association, Antitrust Law Developments 33 (1975), and cases cited therein. Moreover, we have made appropriate provision in Part I of the Final Order for those circumstances in which some of the respondents collectively own retail stores.
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Complaint counsel appeal from the failure to include Gibson's, Inc., the principal post-November 1, 1972, corporate entity, in the boycott provisions of the order. The ALJ reasoned that since Gibson's, Inc., did not exist at the time of the boycott, it should not be covered (ID 210). We disagree.

The evidence indicates and we have found that the boycott of Toastmaster continued until at least 1974, and indeed,

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(footnote 18 continued)
We have no occasion here to examine the outer reaches of intra-firm conspiracy doctrine in any event, principally because the conspiracy we have found relates mainly to the agreement between the respondents (and each of them) and the Gibson franchised stores to boycott designated suppliers' product lines. Also, of course, the corporate respondents were all held because their interdependence required doing so in order to insure the effectiveness of the relief ordered, and "bathtub conspiracy" doctrine does not address this question at all.

complaint counsel contend that Jeannette is still being boycotted. (RAB 31). Since institutional management of the Toastmaster boycott, at least in the post-November 1, 1972 period, was in the hands of Gibson's, Inc., which became the franchisor corporation, or of its officials, we find that that corporation participated substantially in the conspiracy, and is chargeable as a member thereof.

Indeed, even if the boycott had not continued after November 1, 1972, it would still be necessary and proper to include Gibson's, Inc. in the order. Where a business found guilty of unfair trade practices is continued by a subsequently formed corporation, both businesses may be subject to the cease and desist order, P. F. Collier & Son Corp. v. FTC, 427 F.2d 261 (6th Cir.), cert.

denied, 400 U.S. 926 (1970). The determination to include the newly formed company hinges on various factors which include whether both companies engaged in the same business, the capability of the new company to resume the unfair practices, and whether there is substantial identity of ownership between the old company and the new, id. at 272. Prior to November 1, 1972, the franchising business and the Gibson Trade Show were operated by Gibson, Sr. under the aegis of Gibson Products Co. Gibson, Jr. and Gerald Gibson were president and executive vice president of that company. Currently, Gibson, Sr. operates the trade show and Gibson, Jr. and Gerald carry on the franchising business through Gibson's, Inc. Clearly the same parties found to have engaged in the boycott are

still in control of the same businesses which were involved in the boycott. In light of the integrated nature of the business operations prior to November 1, 972, the fact that the Gibson Trade Show continued to be oriented to Gibson stores, and the existing family relationship, the division of labor represented by the franchising business being taken over by the newly formed Gibson's, Inc. does not justify excluding that corporation from the order. Thus, the order will run to this corporation as well.

Count III

Complaint counsel challenge under Section 2(c) of the Clayton Act[19] the

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[19]Section 2(c), 15 U.S.C. §13(c) (1976), provides:

"That is shall be unlawful for any person engaged in commerce,

(footnote continued on next page)

receipt of commissions by Gibson, Sr., from two brokers representing Ray-O-Vac Company, Barshell, Inc., and Al Cohen Associates, Inc. The statute bans payments of brokerage or allowances in lieu thereof by one party in a transaction to the other and by either party to the other's agent. Complaint counsel tried

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(footnote 19 continued)
to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

the Count III charges on the theory that Gibson, Sr. acted in these transactions as a principal or buyer, not on the theory that he acted as intermediary or agent of other respondents or nonrespondent franchisees.

The ALJ found that Gibson, Sr. (but none of the other Gibson family respondents) had violated Section 2(c) by splitting brokerage fees with Barshell.[20] (ID 198). At least one payment by Barshell to Gibson, Sr. of a part of its

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[20]Gibson, Sr. argues that the specific violation found by the ALJ was not alleged in the complaint. (RAB 8). We find, however, that respondent had ample notice of what complaint counsel intended to prove, that he had adequate opportunity to defend against the charges, and that he, in fact, took advantage of this opportunity. See, inter alia, Complaint Counsel's Answer to Motions to Exclude Evidence, and Respondent's Reply to Answer to Motions to Exclude Evidence, each filed December 2, 1977.

commissions from Ray-O-Vac was made in September, 1972, while Gibson, Sr. was owner and operator of various Gibson retail stores, and, thus, while he was clearly a "buyer". As a consequence, an order was entered against Gibson, Sr.

With respect to the charge of splitting commissions with Al Cohen Associates, the ALJ found that while substantial payments to Gibson, Sr. had been made by Al Cohen in 1974 and 1975, Gibson, Sr. was not a "buyer" at the time, because he no longer had an ownership interest in any retail operation. The law judge, therefore, found that Section 2(c) had not been violated and dismissed the complaint against Al Cohen and Associates. (ID 198).

Both sides appeal, and we will consider each of the issues raised seriatum.

First, Gibson, Sr., relying on Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186 (1974), contends that the "in commerce" requirement of Section 2(c) has not been met. (RAB 19-22) We disagree.

The question answered in the negative by the Supreme Court in Copp was "whether a firm engaged in entirely intrastate sales of asphaltic concrete, a product that can be marketed only locally, is a corporation 'in commerce' within the meaning of each of these sections [§2(a) of the Clayton Act, as amended by the Robinson-Patman Act, and §3 and 7 of the Clayton Act] and whether such sales are 'in commerce' and 'in the course of such commerce' within the meaning of §2(a) and 3 respectively." Id. at 188. There was no argument in Copp that sales were, in fact, made interstate commerce or were

otherwise directly involved in national markets. Rather, Copp argued only that the "in commerce" requirement was satisfied because the asphaltic concrete was used in construction of interstate highways. Id. at 198.

By contrast, the brokerage payments made in this case were allowances upon all Ray-O-Vac sales to Gibson retail stores, both family owned and franchised, in a 20-state area. (ID 194). Thus, not only could one find an "ample nexus to interstate commerce in the whole transaction," Shreveport Macaroni Manufacturing Co. v. FTC, 321 F.2d 404, 409 (5th Cir. 1963), cert. denied, 375 U.S. 971 (1964), as the ALJ did, but the underlying sales were, in fact, directly interstate commerce, making this a straightforward case.

Respondent's other threshold argument is that a showing of discrimination is a necessary prerequisite to a finding of a Section 2(c) violation. (RAB 22-25). Once again, we disagree.

The proscription of Section 2(c) is absolute in prohibiting the payment of brokerage to the other party to a transaction or to that party's agent, "except for services rendered." The legislative history[21] and the case law support this understanding. Such doubt as exists in

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[21]The Conference Report states:

> "[T]his subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller

(footnote continued on next page)

this area was created by dicta in the decision of the Supreme Court in FTC v. Broch & Co., 363 U.S. 166 (1960).[22] While Broch may have generated some confusion, see Rowe supra at 341-45, the weight of authority is that a showing of discrimination in the payment of "dummy brokerage" is not a generic statutory requirement.

(footnote 21 continued)
direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other."

H.R. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936).

[22]Respondent's argument is not based on a specific holding in Broch, but only upon the Court's occasional references, in the context of the facts of that case, to "discriminatory" brokerage.

In Broch an independent broker agreed to lower his commission in order to give a purchaser a lower price. The issue was whether the lower price that the buyer obtained was an allowance in lieu of brokerage in violation of Section 2(c). The Supreme Court found a violation, reasoning that this situation was analogous to a broker splitting part of his commission with buyer. The Court was concerned, however, that brokers be able to change their prices without every consequent saving to a buyer being judged an "allowance in lieu of brokerage." Thus, the Court wrote, "[t]his is not to say that every reduction in price coupled with a reduction in brokerage, automatically compels the conclusion that an allowance in lieu of brokerage has been granted." 363 U.S. at 175. The Court went on to explain

that "[a] price reduction based upon alleged savings when given only to favored customers." Id. at 176. The Court's language that "whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case," id., cannot fairly be read to require a showing of discrimination as a prerequisite to finding any Section 2(c) violation.

Read as a whole, Broch represents an effort by the Court to plug a possible statutory loophole through use of the "allowance in lieu of brokerage" provision. Because of difficulties peculiar to transactions of the type considered in Broch, it was necessary to use the notion of discrimination as an element in establishing whether a price reduction was an allowance in lieu of brokerage.

The instant case is quite different, however. Here it is alleged that the seller made payments to a broker who, in fact, was under the control of the buyer and who passed on most of his commissions to that buyer.[23] Broch reviews the legislative history of Section 2(c), finding:

> "One of the favorite means of obtaining an indirect price concession was by setting up 'dummy' brokers who were employed by the buyer and who in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This

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[23]The ALJ found that "Gibson, Sr.'s review of Ray-O-Vac's commission statements to Miller, ostensibly a seller's broker, to determine how much brokerage he should receive, demonstrates respondent's control of the latter." (ID 197).

> practice was one of the chief targets of §2(c) of the Act."
>
> 363 U.S. at 169.

Thus, the type of transaction we consider here is precisely that which it was the major legislative purpose to curtail. While respondent quotes a great length from such cases as Shreveport Macaroni Manufacturing Co. v. FTC, supra; Gulf Oil Corp. v. Copp Paving Co., Inc., supra; and Roher v. Sears, Roebuck & Co., 1975-1 Trade Cas. ¶60,352 (E.D. Mich. 1975), for the proposition that Section 2(c) is directed at discrimination, none of these cases is factually apposite and none demonstrates that, in general, discrimination is a necessary element of a Section 2(c) violation.

As a matter of statutory construction of Section 2 as a whole, subsection 2(c),

like subsections 2(d) and 2(e), necessarily makes certain business practices, other than price discrimination, unlawful, as it is designed to eliminate hidden preferences by forcing them "into the open" for measurement and adjudication under the more forgiving price discrimination provisions. FTC v. Simplicity Pattern Co., 360 U.S. 55, 68 (1959).[24] Moreover, subsections 2(d) and 2(e) on their face require a showing of discrimination, while subsection 2(c) does not, thus manifesting an explicit congressional determination not to require discrimination as a precondition to finding illegal dummy brokerage. Given

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[24]The Court in FTC v. Simplicity Pattern Co. noted expressly that each of subsections (c), (d), and (e) makes certain practices other than price discrimination unlawful. 360 U.S. at 65.

the purpose and structure of the Act and the illogic of addressing the problem of dummy brokerage in terms of discrimination, a general requirement that discrimination be shown cannot and should not be read into Section 2(c).

Complaint counsel cites Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966), for the proposition that Broch is not to be understood to require generically a showing of discrimination, and we find the discussion in that case convincing. In Rangen it was concluded that Section 2(c) applies to payment of commercial bribery and that discrimination is not a necessary element of a Section 2(c) violation.

The Court explained that:

> "... discrimination was used in Broch to determine if the price arrangement was an "in lieu" of brokerage transaction' and, although discrimination would appear now to be relevant in reduced-commission cases, it does not follow that it is now an essential element in cases involving the outright payment of unearned brokerage."
>
> 351 F.2d at 858

Respondent cites no decisions other than Broch-type cases involving allowances in lieu of brokerage in which a Section 2(c) case was dismissed for failure to show discrimination. We, therefore, conclude that Section 2(c) means, in essence, what it says, and that complaint counsel need not demonstrate, as respondent would require, that dummy brokerage has been paid to others, with favored customers receiving larger payments.

Accordingly, the threshold requirements to utilize Section 2(c) have been satisfied in this case.

Respondent next raises certain factual objections to a finding of a Section 2(c) violation. Gibson, Sr. contends that the check that was issued to him on September 23, 1972 (CX 192), which was found by the ALJ to be evidence of the illegal brokerage, was, in fact, an unrelated 3% commission or show fee due Gibson, Sr. for sales by the Gibson Trade Show of merchandise belonging to Barshell. (RAB 13). There is a conflict in the testimony on this point between Barshell's proprietor, Mr. James Miller, and Mr. Lynn Low, a trade show buyer for Gibson, Sr. We resolve the conflict as the ALJ did, by crediting Mr. Miller's testimony.

Mr. Miller testified, in essence, that Gibson, Sr. would review his "commission statements" (which indicated total sales by Ray-O-Vac through Barshell to Gibson stores) and assess a corresponding charge as his brokerage fee upon Mr. Miller's commission. (Tr. 3132-34). Mr. Miller identified the check in question (CX 192), as his payment to Gibson, Sr., for this purpose. Mr. Low contended that CX 192 was Barshell's check in payment for the Gibson Trade Show's sales of Barshell's health and beauty aids. (Tr. 7523-24). There is evidence, however, that Mr. Miller sold health and beauty aids, not through Barshell, but through his other corporation, Progressive Brokerage. (Tr. 3136-37). In fact, Mr. Miller testified that Barshell was formed specifically to be a housewares distributor, "[a]nd

that's why I chose to move it [Ray-O-Vac] into that company [Barshell], as opposed to our beauty aids rep." (Tr. 3145). Had the payments been for the purpose described Mr. Low, therefore, the check presumably would have been made out to Progressive Brokerage, rather than to Barshell. Moreover, Mr. Miller's testimony is consistent with evidence of Gibson, Sr.'s course of dealing, and is specifically consistent with the ALJ's finding that Gibson, Sr. had an agreement with Mr. Miller's successor as agent for Ray-O-Vac to do precisely the same thing. (ID 425-29).

Gibson, Sr. next contends that he was not a buyer in September, 1972, and thus, cannot be liable under complaint counsel's theory of violation. (RAB 17-19). This argument is without merit.

We agree with the ALJ that at least in the context of his personal ownership and operation of individual retail stores, as well as in his role as head of Gibson Products Company, Gibson, Sr. was plainly a buyer.

Respondent relies heavily on Nuarc Co. v. FTC, 316 F.2d 576 (7th Cir. 1963), where it was held that under certain circumstances mere ownership may not suffice to make one a buyer within the meaning of the Act, but Nuarc is factually inapposite. In that case the Commission was required to try to establish a link between two corporations to show a pass-through of benefits from one to another. The instant case is substantially different. Purchases from Ray-O-Vac by at least the Gibson, Sr. owned retail operations can be attributed to the actions of Gibson,

Sr. personally. No pass-through of benefits need be demonstrated. Gibson, Sr. is covered by the statutory provision because, as the buyer in the transaction, he or his agent received brokerage payments from the other party to the transaction or from his agent.

Finally, respondent argues that assuming CX 192 represents a brokerage check and assuming that he was a buyer at the time, he has met the statutory exception for "services rendered". (RAB 28-30). It is unclear whether this exception applies as between buyer and seller, although Broch, supra at 173-74, suggests that it may.[25] However, even assuming that buyers may

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[25]"There is no evidence that the buyer rendered any services to the seller or to the respondent [broker] nor that anything in its method of dealing justified its getting a discriminatory price by means
(footnote continued on next page)

avail themselves of it, respondent has not come forward with adequate evidence to substantiate this claim.

Respondent has made no effort in concrete terms to establish the value of the services he rendered in relation to the brokerage payments he received. It is not contested that respondent's services in inducing the purchase of Ray-O-Vac products by Gibson stores were in the nature of brokerage or were "selling type" services within the exception in Section 2(c). But, even assuming this exception is available to buyers, respondent's burden

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(footnote 25 continued)
of a reduced brokerage charge. We would have quite a different case if there were such evidence and we need not explore the applicability of §2(c) to such circumstances," FTC v. Broch & Co., supra at 173; but, cf., Southgate Brokerage Co., Inc. v. FTC, 150 F.2d 607 (4th Cir.), cert. denied, 326 U.S. 774 (1945).

is considerably greater and more specific than he contends, and by doing little more than articulating his claim to the exception, he has failed to meet that burden.

Alternatively, several cases suggest the availability in these circumstances of a "functional discount" justification. See Central Retailer-Owned Grocers, Inc. v. FTC, 319 F.2d 410 (7th Cir. 1963); Empire Rayon Yarn Co., Inc. v. American Viscose Corp., 364 F.2d 491 (2d Cir. 1966) (en banc), cert. denied, 385 U.S. 1002 (1967); and Hruby Distributing Co., 61 F.T.C. 1437 (1962). Specifically, respondent would have to demonstrate that he performed a valuable service entitling him to a functional discount, the size of which would correspond to the distribution costs the seller saves as a result. See

Central Retailer, supra at 414; Empire Rayon, supra at 492.

The analysis that would be undertaken to ascertain whether respondent had proffered an adequate functional discount justification would closely approximate that undertaken to evaluate the "services rendered" by him. The two concepts share a marked similarity, although the focus of each differs slightly, in that the first examines the overall value of respondent's services, while the second fixes upon the savings to the supplier as a consequence of respondent's performance of certain functions the supplier otherwise would have undertaken itself. Arguable, the "services rendered" exception is broad enough to encompass any justification which might be offered under the functional discount rubric, but the ALJ

considered them separately and, for purposes of review, we do likewise.

The ALJ concluded, correctly, that there was no showing here that respondent performed any functions that might have entitled him to a discount of a measurable size. For example, it was not shown that Gibson, Sr. assumed the credit risk, serviced small unit purchases or maintained and operated a warehouse storing Ray-O-Vac's products. Nor was there evidence that Ray-O-Vac was even aware of his activities. As the ALJ noted, this militates strongly against any finding that the split brokerage constituted a functional discount for distributional services. Respondent's appeal, therefore, is denied.

Complaint counsel's appeal is premised exclusively upon the theory that all of

the Gibson respondents constituted a "single economic enterprise," both before and after November 1, 1972. Under this scenario, all respondents should be found liable and placed under order as a consequence of the Barshell transaction, and Al Cohen Associates should be held as a consequence of the transactions in which it was involved, for if all respondents comprised a single enterprise, then Gibson, Sr. must have been a buyer even in 1974 and 1975, when he no longer owned any Gibson retail stores.

To a large extent, we need not address the merits of complaint counsel's appeal. Leaving aside the "single economic enterprise" contention, there is no doubt that before November 1, 1972, all Gibson businesses were at least closely knit. (See discussion supra at p. 18-19). The

Gibson Products Company, through which Gibson, Sr. conducted the franchising, trade show and brokerage businesses, and the various corporate entities through which the Gibson owned retail stores were operated were completely interdependent and under the control of the same few individuals in the Gibson family. For purposes of relief in this environment, there is ample justification to bind all Gibson corporate respondents, except dissolved corporations, and all Gibson family respondents in order to insure that the order we issue today is not circumvented.[26] Sunshine Art Studios, Inc.,

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[26]The ALJ found that the liability of respondents H. R. Gibson, Jr. and Gerald Gibson for Section 2(c) violations could not be established, because complaint counsel failed convincingly to tie them to the receipt of illegal brokerage. (ID 202-03). While we do not reverse this
(footnote continued on next page)

V. FTC, supra; Delaware Watch Co., Inc. v. FTC, supra.

We are aware that this disposition means that no order will issue against Al Cohen Associates, for we do not address whether a "single economic enterprise" existed after November 1, 1972. In view of the fact that we are binding all of the individual Gibson respondents, however, we do not find this to be a significant omission.

Remedy

A broad order is warranted against all respondents charged in connection with Count II. A substantial question is presented, however, with respect to paragraph 5 of the ALJ's order, which directs respondents to cease and desist from "utilizing franchising or licensing agreements containing (a) provisions

whereunder respondents undertake to give merchandising advice to the licensees or franchisees and (b) provisions whereunder respondents retain the right of quality control over the products sold and services rendered by such licensees or franchisees."

The ALJ found that virtually the only occasions upon which these provisions had been exercised had been to further group boycotts of the type we condemn today. He concluded that, "[i]n view of respondents' insistence that those provisions in the agreement have not been exercised, the imposition of such a provision in the order deprives them of no valuable right." (ID 211)

We are troubled by this provision, because merchandising advice and quality control clauses in franchise agreements

are hardly novel, and they frequently offer legitimate protection to the franchisor's trade name without also serving an anticompetitive purpose. It may indeed be the case that respondent's illegal conduct has been perpetrated under the guise of these clauses, but the remedy may be to restrain the conduct, not the clauses. We are satisfied that an order addressed to conduct, especially as it affects price or concerns suppliers vis-a-vis the trade show, will be adequate to insure that the underlying purpose of the order is not circumvented. We have modified the order to substitute for paragraph 5 of the ALJ's order a more narrow provision focusing on the content of communications from respondents to franchisees. It should, accordingly, be very difficult for respondents to utilize

the merchandising advice and quality control clauses they retain in an anti-competitive manner without thereby violating another provision of the order.

Respondents' additional objections to paragraphs 3 and 4 of the ALJ's order are denied, as these provisions constitute reasonable fencing-in related directly to the conduct held to be illegal in this case. FTC v. Mandel Brothers, Inc., 359 U.S. 388 (1959); FTC v. National Lead Co., 352 U.S. 419 (1957); Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946). Essentially, these provisions prevent respondents from blocking supplier sales to franchisees, either at respondents' whim or, more specifically, because the supplier has not met respondents' terms for participation in the trade show. Thus, these provisions operate to frustrate nascent group

boycotts by preventing respondents from interfering with supplier-franchisee transactions under specified circumstances.

All other objections raised to the order provisions relating to Count II have been considered and are denied.

Gibson, Sr. contends that the order provisions resulting from Count III violations are also overbroad, in that they are not limited to transactions in which he is a buyer, but include those in which he acts as agent or intermediary for a buyer. We see no infirmity in this extension; rather we view it as permissible fencing-in related directly to the conduct held to be illegal herein.

Such fencing-in is particularly appropriate in light of the interrelationship among respondents. At least since November 1, 1972, there has been an

enhanced potential for Gibson, Sr. to act as agent or intermediary for retail stores owned by other members of the Gibson family. Indeed, he owns no stores outright at this time, meaning that, leaving aside the possibility of treating all respondents as a "single enterprise", an order limited to Gibson, Sr.as a buyer might have little practical effect. Finally, it is not true, as Gibson, Sr. suggests, that the ALJ's finding that no liability attached to the Al Cohen transaction constituted a vindication for Gibson, Sr. in those circimstances where he was not a buyer, but merely an agent. The issue of Gibson, Sr.'s agency was not joined, for complaint counsel elected to try the case solely on the theory that Gibson, Sr. was a buyer. The ALJ's finding, therefore does not bear on this question of order coverage.

All other objections raised to the order provisions relating to Count III have been considered and are denied.

Finally, respondents contend generally that no order should be issued, because the evidence is old and the practices found to be unlawful are isolated instances of misconduct. We do not agree. Respondents cannot and do not contend that the law violations were inadvertent or that these practices were voluntarily abandoned, even after issuance of the complaint. Given the nature and structure of their business operation, which remains essentially unchanged, and given the absence of any evidence of abandonment, we find that an order is necessary to combat a cognizable danger of recurrence of the violations.

To promote clarity, we have made numerous stylistic and grammatical changes to the order entered by the ALJ.

April 30, 1980

United States Court Of Appeals

FOR THE FIFTH CIRCUIT

No. 80-1743

FTC Docket No. 9016

HERBERT R. GIBSON, JR., ET AL.,

Petitioners,

versus

FEDERAL TRADE COMMISSION,

Respondent.

No. 80-1746

H.R. GIBSON, SR., ET AL.,

Petitioners,

versus

FEDERAL TRADE COMMISSION,

Respondent.

Petitions for Review of a Final Order of the Federal Trade Commission

Before BROWN, COLEMAN AND RUBIN, Circuit Judges.

JUDGMENT

These causes came on to be heard on the petitions of Herbert R. Gibson, Jr., et al. and H.R. Gibson, Sr., et al. for review of a final order of the Federal Trade Commission of the United States, and were argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the final order of the Federal Trade Commission in these causes be and the same is hereby, affirmed and enforced;

IT IS FURTHER ORDERED that petitioners pay to respondent the costs on appeal, to be taxed by the Clerk of this Court.

August 13, 1982

ISSUED AS MANDATE: September 23, 1982

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-1743

HERBERT R. GIBSON, JR., ET AL.,
Petitioners,

versus

FEDERAL TRADE COMMISSION,
Respondent.

Petition for Review of an Order of the
Federal Trade Commission

ON PETITION FOR REHEARING

(September 13, 1982)

Before BROWN, COLEMAN AND RUBIN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/S/ JOHN R. BROWN
United States Circuit Judge

15 USC §45(b)

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order would not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state in its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice."

15 USC §45(1)

"(1) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such action, the United States district courts are empowered to grant mandatory injunctions and such other further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission."

15 USC §13(c)

"(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, or any party to such transaction other than the person by whom such compensation is so granted or paid."

Office-Supreme Court, U.S.
FILED
MAR 14 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-972 and 82-984

In the Supreme Court of the United States

OCTOBER TERM, 1982

HERBERT R. GIBSON, JR., ET AL., PETITIONERS
v.
FEDERAL TRADE COMMISSION

H.R. GIBSON, SR., ET UX., PETITIONERS
v.
FEDERAL TRADE COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners in No. 82-984 waived any right to discovery concerning the possible disqualification of the Administrative Law Judge who presided over their administrative trial.

2. Whether the court of appeals erred in upholding the Commission's determination that petitioner Gibson, Sr. collected dummy brokerage fees in violation of 15 U.S.C. 13(c) (No. 82-984).

3. Whether the Commission properly directed its order prohibiting future violations of 15 U.S.C. 13(c) to petitioners in No. 82-972.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-972

HERBERT R. GIBSON, JR., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

No. 82-984

H.R. GIBSON, SR., ET UX., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-75a)[1] is reported at 682 F.2d 554. The opinion and order of the Federal Trade Commission (Pet. App. 76a-179a) are reported at 95 F.T.C. 721. The initial decision of the administrative law judge is reported at 95 F.T.C. 553 (1980).

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[1] "Pet. App." references are to the appendix to the petition in No. 82-972.

JURISDICTION

The judgment of the court of appeals (Pet. App. 180a-181a) was entered on August 13, 1982, and a petition for rehearing was denied on September 13, 1982 (Pet. App. 182a). The petition for a writ of certiorari in No. 82-972 was filed on December 10, 1982, and in No. 82-984 on December 13, 1982 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Administrative Procedure Act, 5 U.S.C. 554, are set forth in the Appendix, *infra*. Section 2(c) of the Clayton Act, 15 U.S.C. 13(c), is set forth at Pet. App. 184a.

STATEMENT

1. This case involves a cease and desist order issued by the Federal Trade Commission against individuals and corporations comprising a closely-knit family enterprise. In 1958, petitioners in No. 82-984, H. R. Gibson, Sr. and his wife, Belva Gibson, founded a discount chain that eventually encompassed more than 500 retail discount stores operating in 29 states, several corporations providing support services to the retail stores, and the Gibson Trade Show. By 1971, the business accounted for $1.6 billion in retail sales. Pet. App. 3a-6a.

The Gibson retail stores generally are incorporated individually. They include stores owned by Gibson family members as well as stores franchised to operate under the Gibson trade name. Franchisees are charged a monthly franchise fee, receive merchandising advice, and are entitled to participate in the Gibson Trade Show, at which representatives of various suppliers exhibit their products and attempt to obtain orders from individual Gibson owned and franchised stores. Gibson, Sr. employs "merchandise managers" or "trade show buyers" to recruit suppliers to

participate in the show, to discuss product lines, billing terms, and prices with the suppliers, and to negotiate with the suppliers to obtain the best possible deal on the products to be shown. Pet. App. 4a, 6a-9a.

The individual petitioners in No. 82-972 are Herbert R. Gibson, Jr. and Gerald P. Gibson, sons of petitioners in No. 82-984. Before November 1, 1972, they were president and executive vice president of Gibson Products Co., which operated the franchising business and the Gibson Trade Show. Thereafter, they carried on the retailing and franchising business through Gibson's, Inc. and Gibson Discount Centers, Inc., the corporate petitioners in No. 82-972. Pet. App. 5a-6a, 140a, 145a.

In February 1975, the Commission issued an administrative complaint against petitioners. Count I charged them with engaging in "unfair methods of competition," in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by inducing suppliers to pay promotional allowances in connection with their participation in the Gibson Trade Show that were not proportionately available to other customers of those suppliers. Count II charged unfair competition in the form of concerted boycotts of suppliers that did not grant the trade show allowances. Count III alleged payment of brokerage for services not rendered, in violation of Section 2(c) of the Clayton Act, 15 U.S.C. 13(c). Pet. App. 10a-11a. Following a 10-month trial, an Administrative Law Judge (ALJ) issued an initial decision dismissing Count I as against all petitioners, entering an order against all petitioners except Gibson's, Inc. on Count II and entering an order against Gibson, Sr. only on Count III. Pet. App. 12a-13a.

2. Both sides appealed the ALJ's decision to the full Commission. The Commission affirmed the dismissal of Count I and the ALJ's findings of violations as to Counts

II and III, but it modified the terms of the cease and desist order. Pet. App. 76a-179a.

Count III, the illegal brokerage payments charge, concerned payments made to Gibson, Sr. by Barshell, Inc. and Al Cohen Associates, Inc., firms that had successively represented the Ray-O-Vac Division of ESB Incorporated in its sales to the Gibson stores. Barshell and its sole owner, James C. Miller, represented Ray-O-Vac in its dealings with the Gibson stores between 1969 and 1974. Miller testified that, during that time, Gibson, Sr. frequently visited his office in connection with Ray-O-Vac matters and, on such occasions, successfully negotiated for kickbacks to be paid to himself or to the Trade Show based on the amount of Ray-O-Vac's sales to the Gibson stores. Pet. App. 11a-12a, 60a; 95 F.T.C. at 666-669.

Miller's testimony was corroborated by documentary evidence. For example, Commission exhibit 192 was a Barshell check in the amount of $13,173.43 made payable to Gibson, Sr. The Commission agreed with the ALJ that this check, and other similar payments to which Miller testified, constituted the transmittal of brokerage payments from Ray-O-Vac, the seller, to Gibson, Sr., who, as owner and operator of various Gibson retail stores, was a buyer from Ray-O-Vac. Pet. App. 60a-62a, 161a-163a; 95 F.T.C. at 668-669.

The Commission found no evidence to support Gibson, Sr.'s claim that he had rendered services to Barshell that justified the brokerage payments. Pet. App. 165a-169a. Accordingly, it concluded that the payments violated Section 2(c) of the Clayton Act, which makes unlawful the payment of brokerage by a seller to a buyer, except for services rendered in connection with a sale or purchase. On the basis of petitioners' "complete interdependence and common control [of the Gibson operation] during the period of the violations" (Pet. App. 13a), the Commission

extended the ALJ's order remedying the brokerage violations beyond Gibson, Sr. to include other Gibson family members and corporations in order to prevent possible circumvention of the order.[2]

The Commission's decision was issued on April 30, 1980. In June 1980, petitioners sought reconsideration by the Commission, for the first time requesting leave to conduct discovery to determine whether a basis existed for seeking disqualification of the ALJ. In support of their request, petitioners cited *Grolier, Inc.* v. *FTC*, 615 F.2d 1215 (9th Cir. 1980), in which a decision of the Commission had been remanded in order to permit discovery with respect to the possible disqualification of an ALJ based on his prior service as an attorney-adviser. Pet. App. 13a-14a.

The Commission denied petitioners' request for reconsideration. It found that in February 1977 the ALJ had apprised counsel for all parties that he had served as an attorney-adviser to former FTC Commissioner Everette MacIntyre from 1963 through January 1971. Although the Commission's pre-complaint investigation of some aspects of the Gibson case had been pending during this period, the ALJ had advised counsel that he personally could recall nothing crossing his desk concerning the Gibsons. Counsel for petitioners then expressly declined, on the record, to object to the ALJ's continued participation in the case. Pet. App. 20a-21a. The Commission therefore concluded that, unlike the party in *Grolier, Inc.* v. *FTC, supra,* petitioners had not timely sought discovery. To the contrary, they had expressly stated they had no objection to the continued participation of the ALJ, and had requested discovery only three years later, after waiting to observe the final outcome of their case.

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[2]The Commission also extended the order under Count II to apply to Gibson's, Inc. Pet. App. 143a-146a.

3. The court of appeals affirmed. Pet. App. 1a-75a. It first held (*id.* at 33a-49a) that petitioners' request for discovery concerning the ALJ's possible disqualification was untimely, any objection having been waived. It next ruled that substantial evidence supported the Commission's findings concerning the boycotts charged in Count II (Pet. App. 49a-59a) and the illegal brokerage payments charged in Count III (Pet. App. 59a-70a). Finally, it held (*id.* at 70a-75a) that the cease and desist order had properly been extended to all Gibson family members and corporations because the substantial interrelationships and business overlaps revealed in the record demonstrated a reasonable relationship between the need to prevent further violations and the remedy chosen by the Commission.

ARGUMENT

The issues raised by the petitions were thoroughly explored and correctly resolved by both the Commission and the court of appeals. The decision below presents no conflict with any decision of this Court or any other court of appeals. Further review therefore is not necessary.

1. There is no merit to the continued challenge by petitioners in No. 82-984 to the Commission's refusal to permit discovery to determine whether there was any basis to seek disqualification of the ALJ. Even if they might have been entitled to conduct such discovery in 1977, when the ALJ disclosed his former status as an aide to a Commissioner, it is clear that petitioners waived any such right both expressly and by their failure to seek discovery in a timely manner.

The Administrative Procedure Act, 5 U.S.C. 554(d), provides that an employee who performs an "investigative or prosecuting" function for an agency may not in that or a factually related case "participate or advise in the decision"

of the case.[3] In *Grolier, Inc.* v. *FTC, supra,* the court of appeals construed this provision to mean that an attorney-adviser to a Commissioner may not subsequently serve as an administrative law judge in a case with which, while an attorney-adviser, he was "sufficiently involved * * * to be apprised of *ex parte* information." 615 F.2d at 1221. The court remanded the case for reconsideration of Grolier's request for discovery and, in view of the results of that reconsideration, the merits of its disqualification motion.

Assuming arguendo that *Grolier* was correctly decided,[4] it holds, at most, that a *timely* request for discovery bearing on an ALJ's disqualifiction cannot be denied where there is a basis for questioning whether he previously was involved in the investigation or prosecution of the same or a related case.[5] Here, however, petitioners failed to make a timely request for disqualification or discovery. Rather, after being apprised of the ALJ's former status, they expressly stated that they did not wish to challenge his participation

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[3]Subsection 554(d)(C) makes clear that the disqualification does not apply "to the agency or a member or members of the body comprising the agency."

[4]The suggestion in *Grolier, supra,* 615 F.2d at 1220, that any prior exposure of an agency employee to evidentiary facts renders him "engaged in the performance of investigative or prosecuting functions" (5 U.S.C. 554(d)) has been criticized as threatening serious interference with the performance by the agency staff of its advisory functions. Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies,* 81 Colum. L. Rev. 759, 771 (1981).

[5]Immediately upon learning of the ALJ's prior service as an attorney-adviser to a Commissioner, Grolier requested him to disqualify himself from further participation in the proceedings. When the ALJ refused, Grolier filed a formal motion with the Commission seeking disqualification and removal of the ALJ and at the same time requesting discovery of specified FTC records it claimed would have tended to show the nature and extent of the ALJ's contact with Grolier's case.

in their case. Only after awaiting the outcomes of both their hearing before the ALJ and their appeal to the Commission did petitioners — three years later — request discovery relating to the ALJ's possible disqualification. Pet. App. 20a-22a. In these circumstances, the court of appeals correctly concluded (*id.* at 32a-34a) that petitioners had waived any objection to the ALJ's participation in their case.

The court below is the third court of appeals to hold (Pet. App. 37a-47a) that challenges to an administrative decision-maker's participation in a case under 5 U.S.C. 554(d) are waivable. See *International Paper Co.* v. *FPC*, 438 F.2d 1349, 1357-1358 (2d Cir.), cert. denied, 404 U.S. 827 (1971); *Democrat Printing Co.* v. *FCC*, 202 F.2d 298, 305 (D.C. Cir. 1952). See also *Marcus* v. *Director, Office of Workers' Compensation Programs*, 548 F.2d 1044, 1051 (D.C. Cir. 1976); *Duffield* v. *Charleston Area Medical Center, Inc.*, 503 F.2d 512, 515-517 (4th Cir. 1974); cf. *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33 (1952). No court has held to the contrary.

Petitioners contend (82-984 Pet. 27-30) that their waiver was not "meaningful" since, prior to the Ninth Circuit's decision in *Grolier, supra*, it was the Commission's settled position that the exemption to the prohibitions of 5 U.S.C. 554(d) applicable to the Commissioners themselves (see note 3, *supra*) also applied to legal advisers to the Commissioners and that, therefore, any objection on their part to the ALJ's participation would have been futile. The Court rejected this same argument in *United States* v. *L.A. Tucker Truck Lines, supra*, 344 U.S. at 37 (footnote omitted):

> It is urged in this case that the [Interstate Commerce] Commission had a predetermined policy on this subject which would have required it to overrule the objection if made. While this may well be true, the Commission is obliged to deal with a large number of like cases.

> Repetition of the objection in them might lead to a change of policy, or, if it did not, the Commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence. Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

Moreover, petitioners here not only failed to object to the ALJ's continued participation in their case, but, when the point was raised by the ALJ himself, they affirmatively waived any objection on the record. Pet. App. 21a. Hence, as the court of appeals observed (*id.* at 35a), petitioners "are in no position to argue that a challenge to the ALJ's participation would have been fruitless."

In any event, as the court below concluded (Pet. App. 47a), "there is simply no indication of any manifest injustice or prejudice to the Gibsons from the participation of [the ALJ in their case]." The court explained (*id.* at 48a):

> The lack of prejudice seems clear from the fact that the transactions forming the basis for liability challenged here occurred after [the ALJ] left the service of Commissioner MacIntyre. The only charge that could possibly rely on ex parte information, that in Count I, was dismissed by the ALJ. Nor have the Gibsons provided or even suggested the existence of any evidence that [the ALJ] either possessed or relied on ex parte information.

2.a. The claim of petitioners in No. 82-984 (Pet. 14-23) that, in the absence of proof of discrimination, no illegal brokerage, within the meaning of Section 2(c) of the Clayton Act, 15 U.S.C. 13(c), was established also is without

merit. The language of Section 2(c) is absolute in prohibiting the payment or receipt of brokerage between parties to a transaction or their agents "except for services rendered" (15 U.S.C. 13(c)).[6] Moreover, one of the practices against which Section 2(c) was specifically directed was that which was proved here: the payment of "dummy brokerage" by a seller (Ray-O-Vac) to a broker (Barshell) who in fact is under the control of, and passing his commission on to, the buyer (Gibson). See page 4, *supra*. As the Court observed in *FTC* v. *Henry Broch & Co.*, 363 U.S. 166, 169 (1960):

> One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act.

See also *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959). Section 2(c) thus renders the payment of "kickbacks" or "dummy brokerage" unlawful regardless of whether similar payments are being made to others.[7]

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[6]See H.R. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936):

> [Section 2(c)] permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other.

[7]There was, of course, no suggestion here that Ray-O-Vac or Barshell was making comparable kickback or dummy brokerage payments to other customers.

Petitioners' reliance (82-984 Pet. 14-17, 21-22) on *FTC* v. *Henry Broch & Co., supra,* and *FTC* v. *Henry Broch & Co.*, 368 U.S. 360 (1962), is misplaced. There, an independent broker had agreed to lower his commission in order to give the purchaser a lower price. The issue was whether the differential in price amounted to an "allowance * * * in lieu" of brokerage, in violation of Section 2(c). This Court found that a violation had occurred, analogizing the situation to that of a broker splitting his commission with the buyer. See 363 U.S. at 174-175. The Court was concerned, however, that genuine brokers be allowed to alter their commissions without condemnation of every consequent saving to a buyer as an "allowance * * * in lieu" of brokerage. The Court explained (*id.* at 175-176; emphasis added):

> This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance "in lieu" of brokerage has been granted. As the Commission itself has made clear, *whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case.*

Petitioners claim (82-984 Pet. 16) support in the underscored language for the proposition that discrimination is a necessary element of proof in Section 2(c) cases. However, because the broker in *Broch* had varied his fee in order to give one customer a price advantage over others, the question whether there could be a Section 2(c) violation in the absence of proof of such discrimination was not before the Court in that case. See Pet. App. 65a.

Moreover, it is plain that in referring to "the discriminatory payment of brokerage," the *Broch* Court did not intend to read into the unequivocal prohibition of Section 2(c) an across-the-board proof requirement not imposed by Congress. Rather, *Broch* simply avoids a construction of

Section 2(c)'s prohibition of allowances "in lieu" of brokerage that might otherwise bar genuinely competitive reductions of fees by brokers. In other words, while "discrimination was used in *Broch* to determine if the price arrangement was an 'in lieu' of brokerage transaction * * *, it does not follow that it is now an essential element in cases involving the outright payment of unearned brokerage." *Rangen, Inc.* v. *Sterling Nelson & Sons*, 351 F.2d 851, 858 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966). Hence, the court of appeals correctly concluded (Pet. App. 66a) that Section 2(c) "requires no price discrimination in a situation of dummy brokerage such as is involved here." See also *Southgate Brokerage Co.* v. *FTC*, 150 F.2d 607, 609-610 (4th Cir. 1945); *Webb-Crawford Co.* v. *FTC*, 109 F.2d 268, 269 (5th Cir. 1940); cf. *Rangen, Inc.* v. *Sterling Nelson & Sons, supra*, 351 F.2d at 856-858 (commercial bribery actionable under Section 2(c) without proof of price discrimination); *Fitch* v. *Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12, 15-16 (6th Cir. 1943) (same).[8]

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[8]There is no conflict between the decision below and the Fifth Circuit's previous decision in *Thomasville Chair Co.* v. *FTC*, 306 F.2d 541 (1962), on which petitioners rely (82-984 Pet. 14-17, 23). By contrast to the dummy brokerage at issue here, *Thomasville Chair*, like *Broch*, involved the question whether price discounts were being offered "in lieu" of brokerage. In any event, if there is any conflict between the two decisions, it is for the Fifth Circuit to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

Petitioners further claim (No. 82-984 Pet. 18-19) that the *Southgate Brokerage Co.* and *Webb-Crawford Co.* decisions, *supra*, were "abandoned as precedent" in *Empire Rayon Yarn Co.* v. *American Viscose Corp.*, 364 F.2d 491 (2d Cir. 1966) (en banc), which adopted Judge Moore's dissent from the decision of the panel in that case, 354 F.2d 182 (1965). But *Empire Rayon Yarn* did not involve the question whether discrimination is an element of a Section 2(c) violation. To the contrary, assuming price discrimination, the question there was whether Section 2(c) applied in the absence of a brokerage relationship. See 354 F.2d at 187, 191-192. Moreover, Judge Moore expressly noted, both in his initial dissent (354 F.2d at 191) and in his subsequent opinion for the en banc court (364 F.2d at 492), that no question of dummy brokerage was involved there.

Petitioners concede (82-984 Pet. 14) that commercial bribery is illegal under Section 2(c) without proof of discrimination. See *Rangan, Inc.* v. *Sterling Nelson & Sons, supra; Fitch* v. *Kentucky-Tennessee Light & Power Co., supra.* The "dummy brokerage" at issue here — the under-the-table payment of brokerage from seller to buyer — is functionally indistinguishable. Hence, no proof of discrimination was necessary to establish a violation of Section 2(c).

b. Petitioners also argue (82-984 Pet. 33-38) that in fact the brokerage payments were not fictitious, but were for actual services rendered. The court of appeals found substantial evidence (Pet. App. 67a-70a) to support the Commission's and the ALJ's findings to the contrary (*id.* at 169a):

> [T]here was no showing here that [Gibson, Sr.] performed any functions that might have entitled him to a discount of measurable size. For example, it was not shown that Gibson, Sr. assumed the credit risk, serviced small unit purchases or maintained and operated a warehouse storing Ray-O-Vac's products. Nor was there evidence that Ray-O-Vac was even aware of his activities. As the ALJ noted, this militates strongly against any finding that the split brokerage constituted a functional discount for distributional services.

This evidentiary issue does not warrant review by this Court. See *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U.S. 490, 523 (1981).

3. The sole claim of petitioners in No. 82-972 (Pet. 5-9) is that they were improperly included in the Commission's order prohibiting the future receipt of illegal brokerage and kickbacks.[9] Petitioners acknowledge (*id.* at 5), however,

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[9]Petitioners in No. 82-972 do not challenge the application to them of the boycott provisions of the Commission's order.

that Commission orders may extend so far as is "reasonably necessary to correct the evil and preserve the rights of competitors and the public," *FTC* v. *Royal Milling Co.*, 288 U.S. 212, 217 (1933), and will be sustained on review if they bear a "reasonable relation to the unlawful practices found to exist," *FTC* v. *National Lead Co.*, 352 U.S. 419, 428 (1957). The decision below fully accords with these principles.

As the court of appeals recognized (Pet. App. 71a-74a), extension of the Commission's order to the parties in No. 82-972 was necessary to prevent circumvention of the prohibition against future violations of Section 2(c). The court agreed (Pet. App. 70a) with the Commission's finding that:

> "The Gibson Products Company, through which Gibson, Sr. conducted the franchising, trade show and brokerage businesses, and the various corporate entities through which the Gibson-owned retail stores were operated were completely interdependent and under the control of the same few individuals in the Gibson family. For purposes of relief in this environment, there is ample justification to bind all Gibson corporate respondents, except dissolved corporations, and all Gibson family respondents in order to insure that the order we issue today is not circumvented."

While petitioners complain of guilt by association, the facts of record reveal that they were far more than passive participants in the Gibson family enterprise that gave rise to the violations found by the Commission. In 1971 and 1972, for example, all of the stock of Gibson, Sr.'s retail stores was held by Gibson Discount Centers, Inc. (95 F.T.C. at 556-557 & n.2), whose officers and directors included the individual petitioners in No. 82-972, Gibson, Jr. and Gerald Gibson, as well as Gibson, Sr. and Belva Gibson (95 F.T.C.

at 705).[10] It was as a buyer for the Gibson stores that Gibson, Sr. received the illegal brokerage payments and it was the purchasing power of those stores that gave Gibson, Sr. the ability to extract dummy brokerage from sellers. In 1972, the ownership of the Gibson stores and the franchising business was transferred to Gibson's, Inc. and the individual petitioners in No. 82-972. See page 3, *supra*. In these circumstances, the Commission properly concluded that application of its order to the successor corporation and to the Gibson sons was the only way to prevent recurrence of the receipt of illegal brokerage by the Gibson stores.

The decision below affirming the Commission's order as to petitioners in No. 82-972 is consistent with the holdings of other courts of appeals that have recognized that where individuals are "transacting an integrated business through a maze of interrelated companies * * * 'the pattern and frame-work of the whole enterprise must be taken into consideration' " in framing an order. *Delaware Watch Co.* v. *FTC*, 332 F.2d 745, 746 (2d Cir. 1964), quoting *Art National Manufacturers Distrib. Co.* v. *FTC*, 298 F.2d 476, 477 (2d Cir. 1962); *Sunshine Art Studios, Inc.* v. *FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973).

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[10]During this period, Gibson, Jr. and Gerald Gibson also were president and executive vice president of Gibson Products Co., under whose aegis the franchising business and Gibson Trade Show were run. See page 3, *supra*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1983

DOJ-1983-03

APPENDIX

5 U.S.C. 554(d) provides:

> The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —
>
> (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
>
> (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.
>
> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply —
>
> (A) in determining applications for initial licenses;
>
> (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
>
> (C) to the agency or a member or members of the body comprising the agency.